الله
بسم الله الرحمن الرحيم

Imām Rouḥollāh Khomeinī's (R.A.)

TAḤRĪR AL-VASĪLAH
(VOL – III)

TRANSLATED INTO ENGLISH
BY
Dr. Sayyid Ali Reza Naqavi

Institute for Compilation & Publication
Of
Imām Khomeinī's (R.A.) Works
TEHRAN. (I.R.I.).
1386 A.H. / 2007 A.D.

TRANSLITERATION

The following system of Transliteration has been followed in the present English Translation:

ṭ	ط	th	ث
ẓ	ظ	ḥ	ح
ʿ	ع	kh	خ
gh	غ	dh	ذ
q	ق	ṣ	ص
ʾ	ء	ḍ	ض

aw	as "ow" in " cow"	a long "a" as in American pronunciation of " all","call"
ay	as "ay" in " day"	i long "i" as "ee" in "seen"
ai	as "a" in " cash"	u long "u" as "oo" in " noon"

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INTRODUCTION

Imām Rouhollāh Khomeinī, May his soul rest in Peace, as a consequence of strict adherence to the principles and teachings of the holy Prophets and Imāms, was blessed with a personality of variegated and multifarious splendour and glory. On the one hand, he was among the most outstanding teachers and highly reputed Mujtahids of the Islamic Seminary, known for their erudition in the field of Islamic Jurisprudence and Principles of Jurisprudence who have to their credit the honour of injecting fresh blood in the veins of Islamic belief and guiding the caravan of the traditional jurisprudence to newer goals. On the other hand, he was an exquisite moral teacher who focused all his attention to fostering spiritual and intellectual training to the people.

In the field of philosophy, he is universally recognized as a great thinker, having his individual and unique ideas and views. He not only relieved the Islamic philosophy of its inertia, but also resuscitated the indolent and languid Islamic seminaries by infusing in them fresh activity and valour. In this mission, he had to endure untold trials and tribulations, whose pain pricked him incessantly in life, and which is to some extent reflected in his famous epistle: "The Spiritual Manifesto". At the same time, he enjoys a leading position in the field of theoretical and practical gnosticism, and is known as "The Father of Gnostics" of his time. His great works are a living evidence of his mastery over the various branches of Islamic learning.

As regards his relentless struggle in the field of practical politics and his crusade against the Toghoots of the time through his clarion call for rising in defence of Truth, and his stupendous perseverance, dauntless courage and manliness and unflinching chivalry, they form a part of the revolution-evoking chapter which has already been acknowledged throughout the four corners of the world.

Imām Khomeinī's perfect grasp of the Islamic and human problems of today, his serious efforts, his dauntless policy and sincere leadership for their solution are self-evident truths and need no further proof. He conquered the hearts of all the people through exposing the satanic designs of their enemies and making prophetic campaign for materialization of the divine plans to frustrate them.

Unfortunately the depth and vastness of his knowledge and erudition has still not been fully introduced to the world. The stormy waves of his revolutionary struggle have touched even the farthest shores. His admirers have peeped into the mysteries of his personality, but alas! only a limited horizon has come in sight, and they have failed to have a profound comprehension of its hidden spheres. It has, therefore, been found necessary to introduce to all the segments of human society the thoughts and works of this conqueror of the hearts of the people, as he is the one who has inherited his pure personality by following in the footsteps of the prophets and the saints, whose powerful and pure ideas are considered to be a humanizing element for the society. This is one of the many steps taken for the fulfilment of the duties and functions of the Institute for Compilation and Publication of Imām Khomeinī's works through scholarly and cultural endeavours.

The present English translation of Imām Khomeini's well- known book: **"Taḥrīr al-Vasīlah"**, consisting of his juristic verdicts, occupies an important place in the program for translating his works into English. At the time of embarking on this Herculean and arduous but at the same time a valuable venture, we have had the following objectives before us:

- We are earnestly eager to make accessible to the present and future English knowing scholars the Imām's valuable verdicts in the field of Islamic jurisprudence.

- A large number of the English knowing people still follow the Imām in their daily pursuits of life. This book will fulfill their need of having detailed verdicts of the Imām on various problems of daily life.

It is an important fact that some of the exquisite individual judgements (*Ijtihāds*) of the Imām have left an indelible and far-reaching mark on the world of *Ijtihād*. The way he has given a new life to Jurists' Rule theoretically and practically is quite obvious for all the intellectuals. Nevertheless, the Imām has always desired that this caravan of thoughts and views must march forward in conformity with the requirements of Time and Place, and this process should go on for ever. The conditions he has enumerated for a jurist and a *Mujtahid*, though difficult to fulfill, are yet indispensable. His attitude towards the safeguard and exploitation of the great treasure of the predecessors, in view of its being balanced, shall always receive laurels by the pioneers of this field and those having a true understanding of Islam. In this regard, the following summary of his views incorporates some very important points:

"I believe in the traditional jurisprudence and the Jawāhirī *Ijtihād*, and do not consider its violation to be permissible. This is the only correct way of *Ijtihād*. But it does not mean that there is no room for further development in the Islamic Jurisprudence. In *Ijtihād*, Time and Place occupy a decisive (fundamental) position. A *Mujtahid* should have all the problems of his time before his view. An intelligent, wise and sagacious *Mujtahid* should have the competence to guide a great Islamic society, rather even a non-Muslim society. Sincerity, piety and abstinence which are the signs (or basic qualifications) of a *Mujtahid* should also be accompanied by the qualities of an administrator and an efficient manager.

"A true *Mujtahid* should have before him the whole corpus of Jurisprudence for judgement that comprehends all the sides of the practical philosophy.

"We should stand up to present the practical jurisprudence of Islam without being influenced by the deceitful West, transgressor East and the prevailing world diplomacy; otherwise, as long as it is concealed in the books and the hearts of the Ulemā, it shall not pose any danger to the robbers.

"*Ijtihād*, as used in today's technology, is not sufficient for administration of the society. The (Islamic Research) Centres and Ulemā should always feel the pulse of the

society's thinking and its future requirements, and should be ready to react, taking a few steps forward before the occurrence of the events.

"It is not far from likelihood that the prevailing systems for the administration of the society may change, and the human societies may need the modern system of Islam for the solution of their problems. The great Ulemā of Islam should be on the look-out for it right from now."

The English translation of **Taḥrīr al-Vasīlah**, *Vol.III,* that is now being published, has been accomplished by Dr. Sayyid Ali Reza Naqavi, former Professor of Shī'ah Jurisprudence, International Islamic University, Islamabad. Dr. Naqavi who holds a Doctorate in Persian Language and Literature from Tehran University has studied in the said discipline for about ten years and has attended the classes of a number of prominent Professors of the University, such as Professors Forouzānfar, Jalāl Homā'ī, Pour-e Dā'oud , Modarres Rezavi, Dr. Moqaddam, Dr. Khānlarī, Dr. Mo'īn, Dr.Yār Shāter, and Dr. Kiyā. During his stay in Iran, he has also worked as a Sub-Editor in some of the leading English newspapers and magazines of Tehran. After his return to Pakistan, he has translated into English and published a number of important legal and juristic texts like Family Laws of Iran, Constitution of the Islamic Republic of Iran, Islamic Penal Laws of Iran, Interest Free Banking Laws of Iran, etc. He has compiled and published, single-handedly, the voluminous *Farhang-e Jāme'* of Persian into English and Urdu. He has also translated *Iqtiṣāduna,* (Vol. II), a monumental work on Islamic economic system by the late 'Allāmah Bāqir Ṣadr for Pakistan Institute of Development Economics, Quaid-i-Azam University, Islamabad. He has also translated from Arabic into Urdu *Āthār al-Bāqiyah*, one of the well-known great works of Al-Berūnī, published by the National Language Authority of Pakistan, Islamabad. In view of these facts, there is no need to emphasize the competence, sincerity and commitment of Dr. Naqavi. Besides, his full command over English, Arabic, Persian and Urdu, his vast experience in research and teaching in the field of Shī'ah Jurisprudence together with his special love and devotion for the late Imām Khomeinī, R.A., have served as the main stimuli for embarking on the colossal task of translating the works of the Imām into English. We pray to the Almighty Allāh for the success in his important mission of introducing the valuable works of the Founder of the Islamic Republic of Iran to the universities and research centres and scholars of the English knowing world.

In the end, we request the honourable readers to let us benefit from their valuable views and suggestions for the collection, safeguard, compilation, translation and publication of the works of the Imām, particularly with regard to the present English translation of his **Taḥrīr al-Vasīlah**, as it is quite likely that even a single remark or opinion may serve as a source of guidance to a large number of people for time immemorial.

Sayyid Sirajuddin Mousavi,
Tehran, Islamic Republic of Iran.

بسم الله الرحمن الرحيم

كتاب الرهن

و هو عقد شرّع للاستيثاق على الدين، و يقال للعين: الرهن والمرهون و لدافعها: الراهن، و لآخذها: المرتهن، و يحتاج إلى الايجاب من الراهن، و هو كل لفظ أفاد المقصود في متفاهم أهل المحاورة كقوله: «رهنتك» أو «أرهنتك» أو «هذا وثيقة عندك على مالك» و نحو ذلك، و القبول من المرتهن و هو كل لفظ دال على الرضا بالايجاب، و لا يعتبر فيه العربية، بل الظاهر وقوعه بالمعاطاة.

مسألة ١ ـ يشترط في الراهن و المرتهن البلوغ و العقل و القصد والاختيار، و في خصوص الأول عدم الحجر بالسفه و الفلس، و يجوز لولي الطفل و المجنون رهن مالهما مع المصلحة و الغبطه و الارتهان لهما كذلك.

مسألة ٢ ـ يشترط في صحة الرهن القبض من المرتهن باقباض من الراهن أو باذ ن منه، ولو كان في يده شيء وديعة أو عارية بل ولو غصباً فأوقعا عقد الرهن عليه كفى، و لا يحتاج إلى قبض جديد، ولو رهن المشاع لا يجوز تسليمه إلى المرتهن إلا برضا شريكه، و لكن لو سلمه إليه فالظاهر كفايته في تحقق القبض الذي هو شرط لصحته و إن تحقق العدوان بالنسبة الى حصة شريكه.

مسألة ٣ ـ انما يعتبر القبض في الابتداء، و لا يعتبر استدامته، فلو قبضه المرتهن ثم صار في يد الراهن أو غيره باذن الراهن أو بدونه لم يضر و لم يطرأه البطلان،

In the name of Allāh, the Compassionate, the Merciful.

SECTION TWENTY –TWO

MORTGAGE *(RAHN)*

A Contract of Mortgage (*Rahn*) is legislated by the Islamic Law in order to render a transaction of Debt satisfactory. Whatever is placed with the creditor as a pledge is called a *Rahn* or *Marhūn* (Pawn), the debtor who places it as a pledge is called *Rahīn* (Mortgagor), the creditor with whom a thing is pledged is called a *Murtahin* (Mortgagee). In a Contract of Mortgage, Declaration is made by the Mortgagor, that is expressed in words conveying its sense by those using the language in which it is expressed, as : "I have mortgaged this thing with you", "This thing is a pledge with you for what (debt) belongs to you," or the like. Acceptance is expressed by the Mortgagee in any words whatsoever that carry the sense of agreement with the Declaration. It is not condition to express Declaration and Acceptance in Arabic. Rather apparently a Contract of Mortgage is constituted even by way of *Mu'āṭāt*.

Problem # 1. It is a condition that the Mortgagor and Mortgagee must possess adulthood (or legal maturity), sanity, intention, and free will. In case of the former, it is also a condition that he must be free from Interdiction, (*Ḥajr*) due to Idiocy (*Safah*) and Insolvency (*Iflās*). A guardian of a minor or lunatic is allowed to enter into a Contract of Mortgage or accept a Pledge on their behalf in case it is in their benefit and interest.

Problem # 2. It is a condition for the validity of a Contract of Mortgage that the mortgaged thing must be taken into possession by the Mortgagee and it must be delivered by the Mortgagor or by his permission. If the Mortgagee has already something (belonging to the Mortgagor) in his possession by way of a *Wadī'ah* (Trust or Deposit), or *'Āriyah*, or even by way of usurpation, and both of them agree to conclude the Contract of Mortgage against it, it shall be sufficient, and there shall be no need of a fresh delivery. If a person mortgages a jointly owned object, it shall not be lawful to deliver it to the Mortgagee without the consent of his partner. If, however, the Mortgagor delivers it to the Mortgagee, apparently it shall be sufficient for the materialisation of delivery that is a condition for the validity of the Contract of Mortgage, though it would be a transgression on the share of his partner.

Problem # 3. It is a condition that the delivery must be made at the beginning of the contract, but it is not a condition for the thing to remain in the possession of the Mortgagee. If, therefore, it is delivered to the Mortgagee, and then it comes in the possession of the Mortgagor or some one else with or without the permission of the Mortgagee, it shall not harm the contract and shall not render it void.

نعم للمرتهن استحقاق إدامة القبض و كونه تحت يده، فلا يجوز انتزاعه منه.

مسألة ٤ - يشترط في المرهون أن يكون عيناً مملوكاً يصح بيعه و يمكن قبضه، فلا يصح رهن الدين قبل قبضه على الأحوط و إن كان للصحة وجه، و قبضه بقبض مصداقه، و لا رهن المنفعة و لا الحر و لا الخمر و الخنزير و لا مال الغير إلا باذنه أو إجازته، و لا الأرض الخراجية ما كانت مفتوحة عنوة، و ما صولح عليها على أن تكون ملكاً للمسلمين، و لا الطير المملوك في الهواء إذا كان غير معتاد عوده، و لا الوقف ولو كان خاصاً.

مسألة ٥ - لو رهن ملكه مع ملك غيره في عقد واحد صح في ملكه، و وقف في ملك غيره على إجازة مالكه.

مسألة ٦ - لو كان له غرس أو بناء في الأرض الخراجية لا إشكال في صحة رهن ما فيها مستقلاً، و أما رهنها مع أرضها بعنوان التبعية ففيه إشكال، بل المنع لا يخلو من قرب، كما لا يصح رهن أرضها مستقلاً على الأقوى، نعم لا يبعد جواز رهن الحق المتعلق بها على إشكال.

مسألة ٧ - لا يعتبر أن يكون الرهن ملكاً لمن عليه الدين، فيجوز لشخص أن يرهن ماله على دين غيره تبرعاً ولو من غير إذنه، بل ولو مع نهيه، و كذا يجوز للمديون أن يستعير شيئاً ليرهنه على دينه ولو رهنه و قبضه المرتهن ليس لمالكه الرجوع، و يبيعه المرتهن كما يبيع ما كان ملكاً للمديون، ولو بيع كان لمالكه مطالبة المستعير بما بيع به لو بيع بالقيمة أو بالأكثر و بقيمة تامة لو بيع بأقل منها، ولو عين له أن يرهنه على حق مخصوص من حيث القدر أو الحلول أو الأجل أو عند شخص معين لم يجز له مخالفته، ولو أذنه في الرهن مطلقا جاز له الجميع و تخير.

مسألة ٨ - لو كان الرهن على الدين المؤجل و كان مما يسرع اليه الفساد قبل الأجل فان شرط بيعه صريحاً قبل أن يطرأ عليه الفساد صح الرهن، و يبيعه الراهن أو يوكل المرتهن في بيعه، و إن امتنع أجبره الحاكم فان تعذر باعه

Of course, the Mortgagee is entitled to its continuous possession, and it is not allowed to dispossess him of it.

Problem # 4. It is a condition for the thing pledged that it must be something that can be owned and lawfully sold and can possessed. So, according to the more cautious opinion, it is not lawful to mortgage a debt before it is received, even if its validity is tenable, though its delivery is considered to be effective after its actual possession. Neither a benefit, a free man, liquor, a swine or a property belonging to another can be pledged except with his permission, nor can a taxed and cultivable land when conquered by force (or by war), or what has been compromised to be a property of the Muslims, nor a bird belonging to some one while in the air even if its return is unusual, nor a public or private endowment property.

Problem # 5. If a person pledges his own property with that belonging to another by a single contract, it shall be valid, but in relation to the property of another, it shall be subject to the permission of (or endorsement by) its owner.

Problem # 6. If there is a plantation or building in a taxed and cultivable land, there shall be no hesitation in the validity of mortgaging separately what lies there. However, mortgaging the land as its adjunct is not free from objection; rather it is not far from being closer to prohibition, in the same way as, according to the stronger opinion, it is not lawful to mortgage its land separately. Of course, it is not far from being lawful to mortgage its title, though with some hesitation.

Problem # 7. It is not a condition that the property pledged must belong to the Mortgagor. So a person is allowed to pledge his property against a mortgage by another voluntarily even without his permission, rather even despite his forbiddance. Likewise, it is permissible for the Mortgagor to borrow something to pledge against his loan. If the Mortgagee accepts it as a pledge and takes its delivery, its owner shall not have recourse against the Mortgagee, and the Mortgagee shall be entitled to dispose it off in the same way as he would be entitled to dispose off a thing belonging to the Mortgagor. If it is disposed off, its owner is entitled to demand from the borrower the price for which it is sold, regardless whether it is sold for that price or more, and the whole price even if it is sold for a lower one. If the Mortgagee prescribes something regarding the quantity of the pledge as to its being prompt or deferred, or to a particular person, the Mortgagor shall not violate it. If he has given him a general permission, he shall be free to do everything as he likes.

Problem # 8. If the mortgage rests on a deferred pledge, and it is something that is perishable earlier than on its maturity, then if it is expressly stipulated that it can be sold before it is subjected to decay, the contract shall be valid, and the Mortgagee shall dispose it off or authorise the Mortgagor to dispose it off. If he refrains, the judge shall compel him to do so. In case of the Mortgagee's inability, the judge shall himself dispose it off. In the absence of the judge, the Mortgagor shall dispose it off. After it is disposed off, its sale proceeds shall be preserved as the pledge. Similar shall be the case if the stipulation of disposing off is inferred from the contract, as when the value of the property is pledged against the mortgage, it shall be lawful to dispose it off and keep the sale proceeds as the pledge. In case it is stipulated that it cannot be disposed off except on the maturity of the mortgage, [and the thing

الحاكم، و مع فقده باعه المرتهن، فاذا بيع يجعل ثمنه في الرهن، و كذلك لو استفيد اشتراط البيع من قرينة كما لو جعل العين بماليتها رهنا، فيصح و تباع و يجعل ثمنها في الرهن، ولو اشترط عدم البيع إلا بعد الأجل بطل الرهن، و كذا لو أطلق و لم يشترط البيع و لا عدمه و لم يستفد الاشتراط بقرينة على الأقرب، ولو رهن ما لا يتسارع إليه الفساد فعرض ما صيره عرضة له كالحنطة لو ابتلّت لم ينفسخ، بل يباع و يجعل ثمنه رهناً.

مسألة ٩ ـ لا إشكال في أنه يعتبر في المرهون كونه معيناً، فلا يصح رهن المبهم كأحد هذين، نعم صحة رهن الكلي من غير فرق بين الكلي في المعين كصاع من صبرة معلومة و شاة من القطيع المعلوم و غيره كصاع من الحنطة لا تخلو من وجه، و قبضه في الأول إما بقبض الجميع أو بقبض ما عينه الراهن، و في الثاني بقبض مصداقه، فاذا قبضه المرتهن صح و لزم، و الأحوط عدم إيقاعه على الكلي، و لا يصح رهن المجهول من جميع الوجوه حتى كونه مما يتمول، و أما مع علمه بذلك وجهله بعنوان العين فالأحوط ذلك و إن كان الجواز لا يخلو من وجه، فاذا رهن ما في الصندوق المقفل و كان ما فيه مجهولاً حتى ماليته بطل، ولو علم ماليته فقط لا يبعد الصحة كما أن الظاهر صحة رهن معلوم الجنس و النوع مع كونه مجهول المقدار.

مسألة ١٠ ـ يشترط فيما يرهن عليه أن يكون ديناً ثابتاً في الذمة لتحقق موجبه من اقتراض أو إسلاف مال أو شراء أو استئجار عين بالذمة و غير ذلك حالاً كان الدين أو مؤجلاً، فلا يصح الرهن على ما يقترض أو على ثمن ما يشتريه فيما بعد، فلو رهن شيئاً على ما يقترض ثم اقترض لم يصر بذلك رهناً، و لا على الدية قبل استقرارها بتحقق الموت و إن علم أن الجناية تؤدي إليه، و لا على مال الجعالة قبل تمام العمل.

مسألة ١١ ـ كما يصح في الاجارة أن يأخذ المؤجر الرهن على الأجرة التي في ذمة المستأجر كذلك يصح أن يأخذ المستأجر الرهن على العمل الثابت في ذمة

is perishable soon], the contract shall be declared void. The same shall be case according to the opinion closer to the traditional authority if the contract is of a general nature and there is no stipulation regarding the sale of the pledged property or otherwise, nor is there any such stipulation by inference. If a person pledges something that is not perishable soon, but it may perish due to coming into contact with something else as when wheat comes into contact with dampness, in such case the contract shall not be declared void; rather, it shall be disposed off and its sale proceeds kept as pledge.

Problem # 9. There is no hesitation in the condition that the mortgaged property must be specified. So an ambiguous Mortgage, as: "One of these", is not valid. Of course, it would be valid to mortgage an absolute thing, without any difference whether it is a part of a specified thing as: a "*Sā'*" (of wheat) from a distinct heap or a sheep from a distinct herd, or it may be otherwise, as a "*Ṣā'*" of wheat. The procedure of delivery in the first case shall be either by taking the delivery of all or what is specified by the Mortgagor, while in the second case by taking the delivery of what it implies. When the Mortgagee takes its delivery, it shall be valid and binding. According to the more cautious opinion, in case of an absolute thing, it shall not be valid.

In case of an ambiguous object of mortgage, the contract is not concluded in any case even if it happens to be something that is legally owned. In case of its knowledge as such, but ignorance about the property itself, according to the more cautious opinion, the same rule shall apply, although its permissibility is not far from being reasonable. So if a person mortgages what is lying in a locked box while what is there in it, including its value, is not known, the mortgage shall be void. If, however, merely its value is known, then it shall not be far from being valid, as apparently the mortgage of a thing whose commodity or species is known but its quantity is not known is valid.

Problem # 10. It is a condition for the thing against which a mortgage is made that it must a confirmed debt against the Mortgager as regards the certainty of its cause of indebtedness, a forward transaction, purchase or hiring something on credit, etc., regardless whether the loan is prompt or deferred. It is not permissible to mortgage a thing against which one wants to borrow subsequently or against the value of a thing that one buys. If a person mortgages a thing against what he intends to borrow, and subsequently he borrows [against it], it shall not be a mortgage, nor against the *Diyat* before it is established after the ascertainment of death, even if it is known that the offence leads to it, nor against the property of *Ju'ālah* before the completion of the job.

Problem # 11. As it is permissible in a Contract of Lease for the Lessor to accept an object as mortgage against the wages due to the employer, in the same way it is permissible for the employer to accept something as mortgage against a job established against the Lessor.

المؤجر.

مسألة ١٢ ـ الظاهر أنه يصح الرهن على الأعيان المضمونة كالمغصوبة و العارية المضمونة و المقبوض بالسوم و نحوها، و أما عهدة الثمن أو المبيع أو الأجرة أو عوض الصلح و غيرها لو خرجت مستحقة للغير فالأقوى عدم صحته عليها.

مسألة ١٣ ـ لواشترى شيئاً بثمن في الذمة جاز جعل المبيع رهناً على الثمن.

مسألة ١٤ ـ لو رهن على دينه رهناً ثم استدان مالاً آخر من المرتهن جاز جعل ذلك الرهن رهناً على الثاني أيضاً، و كان رهناً عليهما معاً، سواء كان الثاني مساوياً للأول في الجنس و القدر أو مخالفاً، و كذا له أن يجعله على دين ثالث و رابع إلى ما شاء، و كذا إذا رهن شيئاً على دين جاز أن يرهن شيئاً آخر على ذلك الدين و كانا جميعاً رهناً عليه.

مسألة ١٥ ـ لو رهن شيئاً عند زيد ثم رهنه عند آخر أيضاً باتفاق من المرتهنين كان رهناً على الحقين إلا إذا قصدا بذلك فسخ الرهن الأول و كونه رهناً على خصوص الثاني.

مسألة ١٦ ـ لو استدان إثنان من واحد كل منهما ديناً ثم رهنا عنده مالاً مشتركاً بينهما ولو بعقد واحد ثم قضى أحدهما دينه انفكت حصته عن الرهانة، ولو كان الراهن واحداً و المرتهن متعدداً بأن كان عليه دين لا ثنين فرهن شيئاً عندهما بعقد واحد فكل منهما مرتهن للنصف مع تساوي الدين، و مع التفاوت فالظاهر التقسيط و التوزيع بنسبة حقهما، فان قضي دين أحدهما انفك عن الرهانة مايقابل حقه، هذا كله في التعدد ابتداءً، و أما التعدد الطاريء فالظاهر أنه لا عبرة به، فلو مات الراهن عن ولدين لم ينفك نصيب أحدهما بأداء حصته من الدين، كما أنه لو مات المرتهن عن ولدين فأعطى أحدهما نصيبه من الدين لم ينفك بمقداره من الرهن.

مسألة ١٧ ـ لا يدخل الحمل الموجود في رهن الحامل و لا الثمر في رهن الشجر إلا إذا كان تعارف يوجب الدخول أو اشترط ذلك، و كذا لا يدخل ما يتجدد

Problem # 12. Apparently it is permissible to mortgage against encumbered things as usurped things, or those guaranteed against *Āriyah*, or what is occupied through *Musāwamah*, or the like. But as regards the liability for the consideration of sale, object of sale, wages or the compensation in a compromise [or Conveyance], etc., if another's entitlement for it is established, then according to the stronger opinion, a mortgage against it shall not be valid.

Problem # 13. If a person buys a thing on credit, he may make its value subject of a mortgage.

Problem # 14. If a person mortgages a thing against a debt, and then borrows a thing from the same Mortgagee, he may make that mortgaged thing an object of mortgage for the second one too, and it shall be treated as an object of mortgage for both simultaneously, regardless whether the second one is equal in kind or quantity to the first or not. Similarly it may be made an object of mortgage against a fourth or fifth debt and so on. Likewise, if a person mortgages a thing against a debt, it shall be permissible for him to mortgage something else against the same debt, so that both the things shall be treated as mortgage against the same debt.

Problem # 15. If a person mortgages a thing with Zayd, and then mortgages it with another person as well with the agreement of both the Mortgagees, it shall be treated as a mortgage against the right of both of them, except when both of them intend to rescind the first one and make it a mortgage exclusively against the second one.

Problem # 16. If two persons take a loan from a single person each one being a debt, and then both of them mortgage something jointly with the Mortgagee even through a single contract, then one of them pays off his debt, he shall be relieved of the liability of the mortgage on his part. If the Mortgagor be a single person and several Mortgagees, so that the Mortgagor be under debt to two persons, and he mortgages something with both of them through a single contract, then each of the two shall be the Mortgagee of half of it provided that their loan be equal. In case, however, it is not equal, then apparently the mortgage shall be divided proportionately between them according to their respective share. If the debt of one of them is paid off, the liability of the mortgage against his share shall be released. This is in case they are initially several. If they become several subsequently, then apparently there shall be no release of the property from liability. If the Mortgagor having two sons dies, the share of one of them shall not be released from liability by paying off his share out of the debt, in the same way as when the Mortgagee having two sons dies, then the debt of the share of one of them is paid off, the amount of his share shall not be treated as released from the liability of the mortgage.

Problem # 17. The embryo of a pregnant animal or the fruit of a tree is not included in the mortgage of the animal or tree, except when it is customary or stipulated as such in the contract. Similarly whatever is added subsequently is not included in the mortgage except when so stipulated.

إلا مع الشرط، نعم الظاهر دخول الصوف و الشعر و الوبر في رهن الحيوان. و كذا الأوراق و الأغصان حتى اليابسة في رهن الشجر، و أما اللبن في الضرع و مغرس الشجر و أسّ الجدار أعني موضع الأساس من الأرض ففي دخولها تأمل و إشكال، و لا يبعد عدم الدخول و إن كان الأحوط التصالح و التراضي.

مسألة ١٨ ـ الرهن لازم من جهة الراهن، و جائز من طرف المرتهن فليس للراهن انتزاعه منه بدون رضاه إلا أن يسقط حقه من الارتهان أو ينفك الرهن بفراغ ذمة الراهن من الدين، ولو برأت ذمته من بعضه فالظاهر بقاء الجميع رهناً على ما بقي إلا إذا اشترط التوزيع، فينفك منه على مقدار مابرأ منه، و يبقى رهنا على مقدار ما بقي، أو شرطا كونه رهناً على المجموع من حيث المجموع، فينفك الجميع بالبراءة من بعضه.

مسألة ١٩ ـ لا يجوز للراهن التصرف في الرهن إلا باذن المرتهن، سواء كان ناقلاً للعين كالبيع أو المنفعة كالاجارة أو مجرد الانتفاع به و إن لم يضر به كالركوب و السكنى و نحوها، نعم لا يبعد الجواز فيما هو بنفع الرهن إذا لم يخرج من يد المرتهن بمثله، كسقي الأشجار و علف الدابة و مداواتها و نحو ذلك، فان تصرف فيما لا يجوز بغير الناقل أثم، و لم يترتب عليه شيء إلا إذا كان بالاتلاف، فيلزم قيمته و تكون رهناً، و إن كان بالبيع أو الاجارة أو غيرهما من النواقل وقف على إجازة المرتهن، ففي مثل الاجارة تصح بالاجازة، و بقيت الرهانة على حالها بخلافها في البيع، فانه يصح بها و تبطل الرهانة، كما أنها تبطل بالبيع إذا كان عن إذن سابق من المرتهن.

مسألة ٢٠ ـ لا يجوز للمرتهن التصرف في الرهن بدون إذن الراهن، فلو تصرف فيه بركوب أو سكنى و نحوهما ضمن العين لو تلفت تحت يده للتعدي، و لزمه أجرة المثل لما استوفاه من المنفعة، ولو كان ببيع و نحوه أو باجارة و نحوها وقع فضولياً، فان أجازه الراهن صح، و كان الثمن و الأجرة المسماة له، و كان الثمن رهناً في البيع لم يجز لكل منهما التصرف فيه إلا باذن الآخر، و بقي العين

Of course, apparently the wool, hair, fur of camels shall be considered to be included in the mortgage, and so are the leaves and branches even if dry included in the mortgage of trees. There is, however, hesitation and objection in the inclusion of milk in the breast [of an animal], the land on which a tree is planted as well as the foundation of a wall, i.e., the land of the foundation, and it not far from being included in the mortgage [of an animal, a tree or a wall], although it is more cautious to reach a compromise and mutual agreement [on this issue].

Problem # 18. A mortgage is binding on the part of the Mortgagor, and revocable on the part of the Mortgagee. The Mortgagor is not entitled to withdraw the mortgaged object without the consent of the Mortgagee, except that the Mortgagee gives up his right of mortgage, or the mortgage is released through the release of the Mortgagor's liability from the debt. If he is released of part of the liability, then apparently the total liability for the rest shall subsist, except when the division of the liability is stipulated [in the contract], or both of the parties stipulate that it shall be considered a mortgage against the whole as regards the whole mortgage, so that the whole is released by the release of a part thereof.

Problem # 19. The Mortgagor shall not make any change in the object of mortgage except with the permission of the Mortgagee, regardless whether means the transfer of the property itself as in a Sale, or its usufruct as in a contract of Lease or its mere utilisation even if no damage is caused to it as riding, residing or the like. Of course, it is not far from being permissible if the change is in the interest of the object of mortgage if it does not go out of the Mortgagee's possession, as watering the trees, or feeding the animals or their medical treatment, or the like. So if a person makes any change in the object of mortgage that cannot be done except by shifting it, it would be wrong on his part. He shall not be liable for anything, except when it leads to its destruction, in which case he shall be liable for the payment of its price, it will be kept as mortgage. If it were in the form of sale, lease or the like, it shall depend on the permission of the Mortgagee. In case of a lease, it is validated y the subsequent permission of the Mortgagee, and the contract of mortgage remains intact, contrary to the case of sale, in which case the sale is validated by subsequent permission, but the contract of mortgage is declared void, in the same way as it is invalidated by sale if the Mortgagee has already given permission for sale.

Problem # 20. A Mortgagee is not allowed to make any change in the object of mortgage without the permission of the Mortgagor. So if he makes any change in it by means of riding, or residence, or the like, he shall be held liable for its replacement in case of its loss while in his possession due to transgression, and shall be bound to pay proper compensation for the benefit accrued to him. If it were by means of sale or lease, or the like, it shall be considered to be concluded unauthorised, so that if the Mortgagor gives permission subsequently, it shall be rendered valid, and he shall be entitled to receive its price and specified hire, and the sale proceeds shall be treated as mortgage in which neither of them shall make any change without the permission of the party, while the property itself shall remain an

رهناً في الاجارة، و إن لم يجز كان فاسداً.

مسألة ٢١ ـ منافع الرهن كالسكنى و الركوب و كذا نماءاته المنفصلة كالنتاج و الثمر و الصوف و الشعر والوبر و المتصلة كالسمن و الزيادة في الطول و العرض كلها للراهن، سواء كانت موجودة حال الارتهان أو وجدت بعده، و لا يتبعه في الرهانة إلا نماءاته المتصلة، و كذا ما تعارف دخوله فيه بنحو يوجب التقييد.

مسألة ٢٢ ـ لو رهن الأصل و الثمرة أو الثمرة منفردة صح، فلو كان الدين مؤجلاً و أدركت الثمرة قبل حلول الأجل فان كانت تجفف و يمكن إبقاؤها بالتجفيف جففت و بقيت على الرهن، و إلا بيعت، و كان الثمن رهناً إذا استفيد من شرط أو قرينة أنها رهن بماليتها.

مسألة ٢٣ ـ لو كان الدين حالاً أو حلّ و أراد المرتهن استيفاء حقه فان كان وكيلاً عن الراهن في بيع الرهن و استيفاء دينه منه فله ذلك من دون مراجعة إليه، و إلا ليس له أن يبيعه، بل يراجعه و يطالبه بالوفاء ولو ببيع الرهن أو توكيله فيه، فان امتنع رفع أمره إلى الحاكم ليلزمه بالوفاء أو البيع، فان امتنع على الحاكم إلزامه باعه عليه بنفسه أو بتوكيل الغير، و إن لم يمكن ذلك لعدم بسط يده استأذن المرتهن منه للبيع، و مع فقد الحاكم أو عدم إمكان الاذن منه باعه المرتهن و استوفى حقه من ثمنه إن ساواه أو بعضه إن كان أقل، و إن كان زيد فهو أمانة شرعية يوصله إلى صاحبه.

مسألة ٢٤ ـ لو لم يكن عند المرتهن بينة مقبولة لاثبات دينه و خاف من أنه لو اعترف عند الحاكم بالرهن جحد الراهن الدين فأخذ منه الرهن بموجب اعترافه ـ طولب منه البينة على حقه جاز له بيع الرهن من دون مراجعة إلى الحاكم، و كذا لو مات الراهن وخاف المرتهن جحود الوارث.

مسألة ٢٥ ـ لو وفى بيع بعض الرهن بالدين اقتصر عليه على الأحوط لو لم يكن الأقوى، و بقي الباقي أمانة عنده إلا إذا لم يمكن التبعيض ولو من جهة عدم

object of mortgage in case of a lease. If the Mortgagor does not consent to it, it shall be declared invalid.

Problem # 21. The benefits accruing upon the object of mortgage like residence, riding, as well as the separate growths as the offspring, fruits, hair or fur, or the interlinked benefits like fatness, or increase in it length or width shall all belong to the Mortgagor, regardless whether they existed at the of mortgage or have appeared subsequently. No benefits are deemed as appended to the contract of mortgage except the interlinked ones. Same is the case with what is deemed included in them in a way that necessitates confinement.

Problem # 22. If a person mortgages the trees with their fruits, or the fruits alone, it shall be valid. If the debt is deferred, and the fruits become ripe before the arrival of the date of maturity, if they can be dried up and can be preserved after drying up, they shall be dried up, and they shall remain as object of the mortgage; otherwise, they shall be sold out, and their sale proceeds shall be kept as the object of mortgage, if it turns out by stipulation or implication that it is mortgaged as a property.

Problem # 23. If the debt is prompt, or it has matured, and the Mortgagee intends to release himself of his liability, then if he were authorised to act as an agent in the sale of the object of mortgage and set off his debt out of the sale proceeds without referring to the Mortgagor. In case otherwise, he shall not be entitled to dispose it off, but must refer to the Mortgagor demand from him discharge of his debt by disposing it off or delegating its authority to the Mortgagee. In case of his denial, he shall refer the case to a judge to compel the Mortgagor to discharge his obligation or dispose it off. In case of his failure to comply, the Judge may dispose it off himself or authorise another to do so. If it is not possible due to lack of capacity, the Mortgagee shall obtain permission from the judge for its sale. In case of absence of the judge or impossibility to obtain his permission, the Mortgagee shall dispose it off, and take his due out of its sale proceeds if it is equal to his due, or part thereof if it falls short. In case it exceeds the amount of his due, the excess shall be a legal trust with him that he shall be bound to pay to its master (the Mortgagor).

Problem # 24. In case the Mortgagee has no evidence to establish his debt, and he is afraid that if he takes his claim before a judge for the mortgage, the Mortgagor would deny having obtained any debt from him, and take the object of mortgage from him according to his claim, and ask him to adduce evidence in favour of his claim, he may dispose off the object of mortgage without referring the case to the judge. Same shall be the case in case of the demise of the Mortgagor, when the Mortgagee is afraid that his heir shall reject his claim.

Problem # 25. If the debt is set off by disposing off part of the mortgaged property, according to the more cautious, though not stronger, opinion, the Mortgagee shall confine to it, and the rest of it shall remain with him as a trust, except when it cannot be partitioned, even if due to the fact if it partitioned no

الراغب أو كان فيه ضرر على المالك فيباع الكل.

مسألة ٢٦ ـ لو كان الرهن من مستثنيات الدين كدار سكناه و دابة ركوبه جاز للمرتهن بيعه و استيفاء طلبه منه كسائر الرهون، لكن الأولى الأحوط عدم إخراجه من ظل رأسه.

مسألة ٢٧ ـ لو كان الراهن مفلساً أو مات و عليه ديون للناس كان المرتهن أحق من باقي الغرماء باستيفاء حقه من الرهن، فان فضل شيء يوزع على الباقين بالحصص، ولو نقص الرهن عن حقه استوفى ما يمكن منه و يضرب بما بقي مع الغرماء في سائر أموال الراهن.

مسألة ٢٨ ـ الرهن أمانة في يد المرتهن لا يضمنه لو تلف أو تعيب من دون تعدٍ و تفريط، نعم لو كان في يده مضموناً لكونه مغصوباً أو عارية مضمونة مثلاً ثم ارتهن عنده لم يزل الضمان إلا إذا أذن له المالك في بقائه تحت يده فيرتفع الضمان على الأقوى، و كذا لو استفيد الاذن في بقائه في المورد من ارتهانه كما لا يبعد مع علم الراهن بالحال، و إذا انفك الرهن بسبب الأداء أو الابراء أو نحو ذلك يبقى أمانة مالكية في يده لا يجب تسليمه إلى المالك إلا مع المطالبة.

مسألة ٢٩ ـ لا تبطل الرهانة بموت الراهن و لا بموت المرتهن فينتقل الرهن إلى ورثة الراهن مرهوناً على دين مورثهم و ينتقل إلى ورثة المرتهن حق الرهانة، فان امتنع الراهن من استئمانهم كان له ذلك، فان اتفقوا على أمين و إلا سلّمه الحاكم إلى من يرتضيه، و إن فقد الحاكم فعدول المؤمنين.

مسألة ٣٠ ـ لو ظهر للمرتهن أمارات الموت يجب عليه الوصية بالرهن و تعيين المرهون والراهن والاشهاد كسائر الودائع، ولو لم يفعل كان مفرطاً و عليه ضمانه

مسألة ٣١ ـ لو كان عنده رهن قبل موته ثم مات و لم يعلم بوجوده في تركته لا تفصيلاً و لا إجمالاً و لم يعلم كونه تالفاً بتفريط منه لم يحكم به في ذمته و لا بكونه موجوداً في تركته، بل يحكم بكونها لورثته، بل و كذلك على الأقوى لو علم أنه قد كان موجوداً في أمواله الباقية إلى بعد موته، و لم يعلم أنه باق فيها أم لا،

one shall be interested in purchasing it, or in case it were harmful for its owner, it shall be disposed off entirely.

Problem # 26. If the [subject of] mortgage belongs to "the exceptions of debt" as the house for his dwelling or an animal for his riding, the Mortgagee shall be allowed to dispose it off and set off his claim with its sale proceeds like other debts, but according to the more cautious opinion it is better that he should not drive the Mortgagor out from the shelter [over his head].

Problem # 27. If the Mortgagor were a pauper, or is dead while he is under debts of others, the Mortgagee shall have a better title to get his debt set off from the mortgage than the rest of the creditors. If something is left [after setting off his debt], it shall be distributed among the rest of the debtors proportionate to their debts. If the object of mortgage falls short of meeting the Mortgagee's claim, it shall be set off as much as possible, and for the rest of his claim he shall share with the other creditors in the other property of the Mortgagor.

Problem # 28. The mortgaged object is a trust with the Mortgagee, but he shall not be liable in case it is destroyed or blemished without omission or commission on his part. Of course, if it were with him as a liability due to its being usurped or, for example, an *Āriyah* under liability, that has been subsequently mortgaged with him, its liability shall not terminate, except when its master has consented to let it remain in his possession, in which case, according to the stronger opinion, its liability shall terminate. The same shall be the case if the permission for its continuation in his possession is implied in case of its being mortgaged, as it is not far from being so in case the Mortgagor has the knowledge about its actual position. If the mortgage terminates due to the payment or release or the like, it shall remain in his possession as a trust on behalf of the owner, and he shall not be bound to deliver it to the owner unless demanded by him.

Problem # 29. The contract of mortgage is not terminated on the death of the Mortgagor or Mortgagee, and it is transferred to the Mortgagor's heirs as a liability for the debt of their propositus (*Mūrith*) and to the Mortgagee's heirs as the title for the mortgage. In case the Mortgagor does not accept the Mortgagee's heirs as honest, he shall be entitled to do so. If they agree on (the appointment of) a trustee, [well and good]; otherwise, the judge shall entrust it to any person of his own accord. In case of absence of a judge, it shall be entrusted to just believers.

Problem # 30. If the symptoms of death appear to the Mortgagor, he shall be bound to make a will about the mortgage, specifying the mortgaged. Mortgagor and witnesses as required in all *Wadī'ah* agreements. If he fails to do so, he shall be deemed to have committed negligence, and he shall be held liable for it.

Problem # 31. If a person has a mortgaged object with him before his death, and then dies, and it is not specified in his legacy in detail or in brief, nor is it understood to have been destroyed due to his negligence, it shall neither be declared as his liability nor a part of his legacy, but shall rather be declared to belong to his heirs. Rather, according to the stronger opinion, the same shall be the case if it is known to be a part of his property existing until after his death, but it is not known whether it still

كما إذا كان سابقاً في صندوقه داخلاً في الأموال التي كانت فيه و بقيت إلى زمان موته و لم يعلم أنه قد أخرجه و أوصله إلى مالكه أو باعه و استوفى ثمنه أو تلف بغير تفريط منه أم لا.

مسألة ٣٢ ـ لو اقترض من شخص ديناراً مثلاً برهن وديناراً آخر منه بلا رهن ثم دفع إليه ديناراً بنية الوفاء فان نوى كونه عن ذي الرهن سقط و انفك رهنه، و إن نوى كونه عن الآخر لم ينفك و بقي دينه، وإن لم يقصد إلا أداء دينار من الدينارين من دون تعيين كونه عن ذي الرهن أو غيره فهل يحسب ما دفعه لغير ذي الرهن فيبقى الرهن أو لذي الرهن فينفك أو يوزع عليهما فيبقى الرهن أو ينفك بمقداره؟ وجوه، أوجهها بقاء الرهن إلى الفك اليقيني.

exists in it or not, as in case previous to his death it did lie inside the box consisting of his belongings and continued to be there until the time of his death, but it is not known whether he had taken it out or returned it to its master or had disposed it off and set off his debt with its sale proceeds, it was destroyed with or without his negligence.

Problem # 32. If a person borrows, for example, a Dīnār from a person against a mortgage, and another Dīnār from him without a mortgage, then pays a Dīnār to him with the intention of discharging the debt, then if he intended it to belong to the one borrowed against a mortgage, the mortgage shall terminate and it shall be released. If, however, he intended the one without a mortgage, it shall not be released, and his debt shall continue to be intact. If he intended just to pay a Dīnār out of the two Dīnārs without specifying it to belong to the one borrowed against a mortgage or otherwise, then will it be considered to belong to the one borrowed without a mortgage so that the mortgage remained intact or to the one against a mortgage so as to release the mortgaged object, or is it to be divided on both of them so that the mortgage would remain intact or is released proportionately. There are several alternatives, the most reasonable being in favour of the subsistence of the mortgage until the release becomes certain.

كتاب الحجر

و هو في الأصل بمعنى المنع. و شرعاً كون الشخص ممنوعاً في الشرع عن التصرف في ما له بسبب من الأسباب، وهي كثيرة نذكر منها ما هو العمدة، وهي الصغر و السفه و الفلس و مرض الموت.

القول في الصغر

مسألة ١ ـ الصغير و هو الذي لم يبلغ حدّ البلوغ محجور عليه شرعاً لا تنفذ تصرفاته في أمواله ببيع و صلح وهبة و إقراض و إجارة و إيداع و إعارة و غيرها إلا ما استثني ـ كالوصية على ما سيأتي إن شاء الله تعالى، و كالبيع في الأشياء غير الخطيرة كما مرّ ـ و إن كان في كمال التميز و الرشد و كان التصرف في غاية الغبطة و الصلاح، بل لا يجدي في الصحة إذن الولي سابقاً و لا إجازته لا حقاً عند المشهور، و هو الأقوى.

مسألة ٢ ـ كما أن الصبي محجور عليه بالنسبة الى ما له كذلك محجور عليه بالنسبة الى ذمته، فلا يصح منه الاقتراض و لا البيع و الشراء في الذمة بالسلم و النسيئة و إن كانت مدة الأداء مصادفة لزمان بلوغه، و كذلك بالنسبة إلى نفسه،

SECTION TWENTY – THREE

INTERDICTION (*ḤAJR*)

Ḥajr or Interdiction actually means prohibition or preclusion, but in law it means forbidding a person from dealing with his property due to any of the reasons. There are several reasons. We mention here some of the main reasons. They are minority, idiocy, insolvency and death sickness.

Chapter One – Minority (*Ṣighr*)

Problem # 1. A minor or one who has not reached the legal age of majority (*Bulūgh)* is not allowed to make any dealing with his property that may be legally effective through sale, conveyance, gift, lending, giving anything on lease, or in trust, *Āriyah*, etc., except what has been exempted, as Wills, as, God Willing, shall follow, or as the sale of goods havin_ nominal value, as already mentioned. Such person may even have attained the age of maturity and ᵈⁱˢcretion, and even if the dealing was in his utmost interest and benefit. Rather, according to the prevalent opinion, even the prior or subsequent permission of his guardian effective in validity of his dealing, and it is also according to the stronger opinion.

Problem # 2. As a minor is interdicted in dealing with his property, in the same way he is interdicted from accepting any liability. So a contract for debt, sale, purchase by *Salam* or on credit shall not be valid, even if the date of its payment may coincide with the time of his attaining the age of legal maturity.

Similarly, a minor shall be interdicted to make any dealing regarding his own person. Therefore, neither shall a marriage contracted by him be legally effective, nor a divorce given by him, according to the stronger opinion, in case he has not attained the age of ten years. According to the more cautious opinion, even if he has attained the age of ten years, and divorces, he must seek release

فلا ينفذ منه التزويج، و لا الطلاق على الأقوى فيمن لم يبلغ عشراً، و على الأحوط فيمن بلغه، ولو طلق يتخلص بالاحتياط، و كذا لا يجوز إجارة نفسه، و لا جعل نفسه عاملاً في المضاربة و غير ذلك، نعم لو حاز المباحات بالاحتطاب و الاحتشاش و نحوهما يملكها بالنية، بل و كذا يملك الجعل في الجعالة بعمله و إن لم يأذن وليه فيهما.

مسألة ٣ ـ يعرف البلوغ في الذكر و الأنثى بأحد أمور ثلاثة: الأول نبات الشعر الخشن على العانة، و لا اعتبار بالزغب و الشعر الضعيف، الثاني خروج المني يقظة أو نوماً بجماع أو احتلام أو غيرهما، الثالث السنّ، و هو في الذكر إكمال خمس عشرة سنة، و في الأنثى إكمال تسع سنين.

مسألة ٤ ـ لا يكفي البلوغ في زوال الحجر عن الصبي، بل لابد معه من الرشد وعدم السفه بالمعنى الذي سنبينه.

مسألة ٥ ـ ولاية التصرف في مال الطفل و النظر في مصالحه و شؤونه لأبيه وجده لأبيه، و مع فقدهما للقيّم من أحدهما، و هو الذي أوصى أحدهما بأن يكون ناظراً في أمره، و مع فقده للحاكم الشرعي، و أما الأم والجد للأم و الأخ فضلاً عن سائر الأقارب فلا و لاية لهم عليه، نعم الظاهر ثبوتها مع فقد الحاكم للمؤمنين مع وصف العدالة على الأحوط.

مسألة ٦ ـ الظاهر أنه لا يشترط العدالة في ولاية الأب والجد، فلا ولاية للحاكم مع فسقهما، لكن متى ظهر له ولو بقرائن الأحوال الضرر منهما على المولّى عليه عزلهما و منعهما من التصرف في أمواله، و لا يجب عليه الفحص عن عملهما و تتبع سلوكهما.

مسألة ٧ ـ الأب والجد مستقلان في الولاية، فينفذ تصرف السابق منهما و لغا اللاحق، ولو اقترنا ففي تقديم الجد أو الأب أو عدم الترجيح و بطلان تصرف كليهما وجوه بل أقوال، فلا يترك الاحتياط.

مسألة ٨ ـ الظاهر أنه لا فرق بين الجد القريب و البعيد، فلو كان له أب

with caution. Likewise, he is not allowed to give himself on hire, or make himself an agent in a contract of *Muḍārabah*, etc.

Of course, if he occupies things having no owner, as collecting fuel or grass, etc. with the intention of possessing them, he shall be entitled to their ownership.

Similarly, a minor shall be entitled to own a *Ja'l* in a contract of *Ju'ālah* by having performed some job or labour, even if his guardian has not given him permission to do it.

Problem # 3. *Bulūgh* or legal maturity is recognized in a male or female in one of the following conditions:

I. Appearance of stiff hair under the pubes. It shall not be applicable in case of appearance of soft hair and fluff.

2. Discharge of semen, while asleep or awake, by sexual intercourse or nocturnal pollution, etc.

3. Having attained the age of fifteen years in case of a male and nine years in case of a female.

Problem # 4. *Bulūgh* is not sufficient for the termination of Interdiction of a minor. Rather it is to be accompanied by maturity of the mind (*Rushd*) and absence of idiocy (*Safah*) in the sense whose details are to follow.

Problem # 5. The right of dealing with the property of a minor as well as looking after his/her interest and affairs belongs to the minor's father or paternal grandfather, and in their absence to the Administrator (*Qayyim*), who is one who has been appointed by will of either of the father or the paternal grandfather to look after the minor's affairs.In case of absence of an Administrator the said right shall go to the judge. As regards the minor's mother, maternal grandfather or brother, the said right shall not belong to any of them, let alone other near relatives.

Problem # 6. Apparently Moral Soundness (*'Adālat)* is not a condition for the right of guardian -ship of a minor's father or paternal grandfather, so that in case of their moral depravity (*Fisq)*, the said right shall not go to the judge. In case, however, of appearance or indications of any harmful acts by either of them in respect of the ward, the judge shall terminate them from guardianship and forbid them to deal with the minor's property. The judge, however, is not bound to make a thorough investigation of their acts and inquiry into their behaviour.

Problem # 7. A minor's father and paternal grandfather enjoy independent right of guardianship over the minor. So the dealing of either of them performed earlier than the other shall be enforced while the one performed subsequently shall stand null and void. In case of their being simultaneous, there are different alternatives, rather opinions some of which are in favour of giving preference to the one performed by the paternal grandfather over that performed by the father, while others are in favour of absence of preference of either of them over the other and declaring both them null and void, and so caution must not be given up.

Problem # 8. Apparently there is no difference in the closer and remoter paternal grandfathers. If a minor has a father, a paternal grandfather, or a grand paternal grandfather, and a great grand

وجد و أب الجد و جدّ الجد فلكل منهم الولاية.

مسألة ٩ ـ يجوز للولي بيع عقار الصبي مع الحاجة و اقتضاء المصلحة فان كان البائع هو الأب و الجد جاز للحاكم تسجيله و إن لم يثبت عنده أنه مصلحة، و أما غير هما كالوصي فلا يسجله إلا بعد ثبوتها عنده على الأحوط و إن كان الأقرب جواز تسجيله مع وثاقته عنده.

مسألة ١٠ ـ يجوز للولي المضاربة بمال الطفل و إبضاعه بشرط وثاقة العامل و أمانته، فان دفعه إلى غيره ضمن.

مسألة ١١ ـ يجوز للولي تسليم الصبي إلى أمين يعلّمه الصنعة، أو إلى من يعلّمه القراءة والخط و الحساب و العلوم العربية و غيرها من العلوم النافعة لدينه و دنياه، و يلزم عليه أن يصونه عما يفسد أخلاقه فضلاً عمّا يضر بعقائده.

مسألة ١٢ ـ يجوز لولي اليتيم إفراده بالمأكول و الملبوس من ماله و أن يخلطه بعائلته و يحسبه كأحدهم فيوزع المصارف عليهم على الرؤوس في المأكول و المشروب، و أما الكسوة فيحسب على كل على حدة، و كذا الحال في اليتامى المتعددين، فيجوز لمن يتولى الانفاق عليهم إفراد كلٍ و اختلاطهم في المأكول والمشروب و التوزيع عليهم دون الملبوس.

مسألة ١٣ ـ لو كان للصغير مال على غيره جاز للولي أن يصالحه عنه ببعضه مع المصلحة، لكن لا يحل على المتصالح باقي المال، و ليس للولي إسقاطه بحال.

مسألة ١٤ ـ المجنون كالصغير في جميع ما ذكر، نعم لو تجدد جنونه بعد بلوغه و رشده فالأقرب أن الولايةعليه للحاكم دون الأب والجد و وصيهما لكن لا ينبغي ترك الاحتياط بتوافقهما معاً.

مسألة ١٥ ـ ينفق الولي على الصبي بالاقتصاد لا بالاسراف و لا بالتقتير ملاحظاً له عادته و نظراءه، فيطعمه و يكسوه ما يليق بشأنه.

مسألة ١٦ ـ لو ادعى الولي الانفاق على الصبي أو على ما له أو دوابه بالمقدار اللائق و أنكر بعد البلوغ أصل الانفاق أو كيفيته فالقول قول الولي مع اليمين، و

grandfather, each of them shall be entitled to the minor's guardianship alike.

Problem # 9. A guardian is authorized to dispose of the real estate (*'Iqār*) of a minor if needed provided his interest so demands. If the seller were the father or the paternal grandfather, the judge shall be authorized to register the transaction, even if it is not established before him that the transaction is in the interest of the minor. But in case the transaction has been made by a person other than the minor's father or paternal grandfather, such as an executor, according to the more cautious opinion, the judge shall not register it unless it is provéd before him that it serves the minor's interest, although, according to the opinion closer to the traditional authority, the judge may register it in case, in his own opinion, the executor is a reliable person.

Problem # 10. A guardian is authorized to enter into a *Muḍārabah* with the minor's property, or enter into a *Biḍā'ah*, provided that the agent is a reliable and trustworthy person. If he hands over the minor's property to some one other than such a person, he shall be held liable for it.

Problem # 11. A guardian is also authorized to hand over the minor to a trustworthy person to train him in some trade or profession, or one who may teach him reading and writing, arithmetic, or Arabic, or other knowledge that is useful for his religious and wordly life. He must protect him from what may corrupt him morally, let alone what is harmful for his religious beliefs.

Problem # 12. A guardian may arrange for the food and clothing of an orphan either separately, or include him in his family and treat him as a member of the family, and calculate the expenditure on the food and drinks on all the members. As regards the clothing, it must be reckoned separately. The same is the rule in case there are several orphans, so that their guardian may spend on the food and drinks of each of them separately or all together and calculate the expenditure accordingly, to the exclusion of clothing.

Problem # 13. If the minor has some debt due from some other person, his guardian may enter into a compromise regarding the payment of part thereof keeping the minor's interest in view. But as regards the rest of it, it shall not be lawful for the other person entering into the compromise (to keep it with himself), and the guardian shall also not drop it any time.

Problem # 14. A lunatic is at par with a minor in all the matters mentioned above. If, however, his lunacy has started after attaining physical and mental maturity, according to the opinion closer to the traditional authority, his guardianship shall go to the judge to the exclusion of the father and the paternal grandfather or an executor appointed by them, though caution must not be given up by obtaining their concurrence together.

Problem # 15. The guardian shall spend on the ward economically and not extravagantly but not with stinginess, keeping in view the usual habits of the minor as well as his equals, and provide food and clothing to him in keeping with his position.

Problem # 16. If the guardian claims to have spent a reasonable amount on the minor or his property or animals, but, on attaining the physical maturity, the ward contends the expenditure itself or its nature, the word of the guardian shall be entertained when followed by his oath, while the minor shall be

على الصبي البينة.

القول في السفه

السفيه هو الذي ليس له حالة باعثة على حفظ ماله و الاعتناء بحاله، يصرفه في غير موقعه، و يتلفه بغير محله، و ليست معاملاته مبنية على المكايسة و التحفظ عن المغابنة، لا يبالي بالانخداع فيها، يعرفه أهل العرف والعقلاء بوجدانهم إذا وجدوه خارجاً عن طورهم و مسلكهم بالنسبة إلى أمواله تحصيلاً و صرفاً، و هو محجور عليه شرعاً لا ينفذ تصرفاته في ماله ببيع و صلح و إجارة و هبة و إيداع و عارية و غيرها من غير توقف على حجر الحاكم إذا كان سفهه متصلا بزمان صغره، و أما لو تجدد بعد البلوغ و الرشد فيتوقف على حجر الحاكم، فلو حصل له الرشد ارتفع حجره، ولو عاد فله أن يحجره.

مسألة ١ ـ الولاية على السفيه للأب و الجدّ ووصيهما إذا بلغ سفيهاً، و فيمن طرأ عليه السفه بعد البلوغ للحاكم الشرعي.

مسألة ٢ ـ كما أن السفيه محجور عليه في أمواله كذلك في ذمته بأن يتعهد مالاً أو عملاً، فلا يصح اقتراضه و ضمانه، و لا بيعه وشراؤه بالذمة و لا إجارة نفسه، و لا جعل نفسه عاملاً للمضاربة و نحوها.

مسألة ٣ ـ معنى عدم نفوذ تصرفات السفيه عدم استقلاله،فلو كان باذن الولي أو إجازته صح و نفذ، نعم فيما لا يجري فيه الفضولية يشكل صحته بالاجازة اللاحقة من الولي، ولو أوقع معاملة في حال سفهه ثم حصل له الرشد فأجازها كانت كاجازة الولي.

مسألة ٤ ـ لا يصح زواج السفيه بدون إذن الولي أو إجازته، لكن يصح طلاقه و ظهاره و خلعه، و يقبل إقراره إن لم يتعلق بالمال حتى بما يوجب القصاص و نحو ذلك، ولو أقر بالنسب يقبل في غير لوازمه المالية كالنفقة، و أما فيها فلا يخلو من

required to adduce evidence in favour of his contention.

Chapter Two – Idiocy (*Safah*)

An Idiot (*Safih)* is one who is not in a condition in which he may protect his property or look after himself, by spending where it should not be spent, and squandering it where it should not done, and his transactions are not based on farsightedness and sagacity to safeguard himself from deceit. He does not care being defrauded in the transactions. Those having normal understanding and reason soon recognize him by finding in him conduct and behaviour contrary to their own as regards earning and spending his property. He is legally interdicted, so that his dealings relating to his property in the form of sale, conveyance, lease, gift, deposit and *'Āriyah*, are not legally enforceable. His idiocy does depend on interdiction by a judge if it has continued from his period of minority. However, if it has resumed after attaining to physical and metal maturity, then indeed it requires interdiction by the judge. If he resumes mental maturity, the interdiction shall be terminated. If, however, he suffers idiocy again, the judge shall have the authority to impose interdiction on him again.

Problem # 1. The right of guardianship of an idiot belongs to the father, paternal grandfather or an executor appointed by them, if he has attained physical maturity in a state of idiocy. In case of a person suffers idiocy after attaining physical maturity, his guardianship shall belong to the judge.

Problem # 2. As an idiot is interdicted from dealing with his property, so also he is interdicted to accept the liability for any property or labour. So a contract for borrowing, guarantee, sale or purchase on credit or giving himself on hire, or making himself an agent in a *Muḍārabah* or the like, entered into by him shall not be valid.

Problem # 3. By non-enforcement of the dealings by an idiot is meant his lack of independence to do it, so that if it is done with the consent or permission of the guardian it shall be valid and enforceable. Of course, in case a contract is not allowed to be concluded by an unauthorized person, there shall be objection if it is sanctioned subsequently by the guardian. If a person executes a transaction in a state of idiocy, and subsequently he attains mental maturity and assents to it, it shall be treated at par with the permission of the guardian.

Problem # 4. A marriage contracted by an idiot without the consent or permission of the guardian is not valid, but a divorce, *Ẓihār* or *Khul'* by an idiot is valid. An acknowledgement made by an idiot is also acceptable if it does not involve any financial liability, even if it entails the liability for *Qiṣāṣ* or the like. If an idiot acknowledges paternity (*Nasab)*, it shall be accepted without any the involvement of financial liability, like maintenance, but in case of maintenance. It is not free from objection, although its establishment is not free from being close to the traditional authority. If an idiot confesses commission

إشكال و إن كان الثبوت لا يخلو من قرب، ولو أقر بالسرقة يقبل في القطع دون المال.

مسألة ٥ ـ لو وكّله غيره في بيع أو هبة أو إجارة مثلاً جاز ولو كان وكيلاً في أصل المعاملة لا مجرد إجراء الصيغة.

مسألة ٦ ـ لو حلف السفيه أو نذر على فعل شيء أو تركه مما لا يتعلق بما له انعقد، ولو حنث كفّر كسائر ما يوجب الكفارة، كقتل الخطأ و الافطار في شهر رمضان، و هل يتعين عليه الصوم لو تمكن منه أو يتخير بينه و بين الكفارة المالية كغيره؟ و جهان، أحوطهما الأول، نعم لو لم يتمكن من الصوم تعين غيره، كما إذا فعل ما يوجب الكفارة المالية على التعيين، كما في كفارات الاحرام كلها أو جلها.

مسألة ٧ ـ لو كان للسفيه حق القصاص جاز أن يعفو عنه بخلاف الدية و أرش الجناية.

مسألة ٨ ـ لو اطلع الولي على بيع أو شراء مثلاً من السفيه و لم ير المصلحة في إجازته فان لم يقع إلا مجرد العقد ألغاه، و إن وقع تسليم و تسلم للعوضين فما سلمه إلى الطرف الآخر يسترده و يحفظه، و ما تسلمه و كان موجوداً يرده إلى مالكه، و إن كان تالفاً ضمنه السفيه، فعليه مثله أو قيمته لو قبضه بغير إذن من مالكه، و إن كان باذن منه لم يضمنه إلا في صورة الاتلاف منه، فانه لا يبعد فيها الضمان، كما أن الأقوى الضمان لو كان المالك الذي سلّمه الثمن أو المبيع جاهلاً بحاله أو بحكم الواقعة خصوصاً إذا كان التلف باتلاف منه، و كذا الحال لو اقترض السفيه و أتلف المال.

مسألة ٩ ـ لو أودع شخص وديعة عند السفيه فأتلفها ضمنها على الأقوى سواء علم المودع بحاله أولا، ولو تلفت عنده لم يضمنها إلا مع تفريطه في حفظها على الأشبه.

مسألة ١٠ ـ لا يسلم إلى السفيه ماله ما لم يحرز رشده، و إذا اشتبه حاله

of theft, it shall be accepted in so far as it applied to cutting off hands without any financial liability.

Problem # 5. If an idiot authorizes another to be an agent on his behalf, for instance, in a sale, gift, or lease, it shall be permissible, even if he acts as agent in the transaction itself and not only in the pronouncement of its formula (*Ṣīghah*).

Problem # 6. If an idiot takes an oath or makes a vow for doing or avoiding something without any financial involvement, it shall be valid. If he violates it, he shall be liable to expiate like other similar cases entailing expiation as an accidental homicide or breaking a fast in the month of Ramaḍān. Whether it is a condition for him to keep fast if possible or he has the option of keeping fast or making a financial expiation like others, there are two alternatives, the more cautious being the former. Of course, in case of his inability to keep fast, he may resort to the other alternative, namely, financial expiation, as when he commits something entailing financial expiation peremptorily, as is the case with all or most of the expiations relating to *Iḥrām*.

Problem # 7. If an idiot has the right of *Qiṣāṣ*, he may grant pardon contrary to the case of *Diyat* or fine (*Arsh*) for a crime.

Problem # 8. If a guardian is informed about the conclusion of a contract for sale or purchase by his idiot ward, but he does not consider it in the interest of the idiot to give its permission, and merely conclusion of the contract has taken place, he may declare it null and void. If, however, the delivery and payment of the price have taken place, he shall demand the return of what has been paid by the idiot and keep it safely, and shall return to the master whatever has been delivered to the idiot. If the thing has been destroyed, the idiot shall be liable to compensate it by returning it equal or its price if he has taken the delivery without the permission of the guardian, but shall be under no liability if he has taken the delivery with the permission of the master, except in case of its destruction, as it is not far from being his liability in it, as also, according to the stronger opinion, he shall be liable for compensation if the master who has tendered the idiot the price or the object of sale were ignorant of the actual condition of the idiot or the rule in such case , if the destruction has been caused by the idiot. The same rule shall apply if the idiot borrows some property from another and destroys it.

Problem # 9. If a person deposits something with an idiot and he destroys it, he shall be held responsible for it, regardless whether he had the knowledge about his condition or not. If the thing is destroyed while in possession of the idiot, according to the opinion in keeping with the principles of law, he shall not be held responsible except in case of his negligence in its protection.

Problem # 10. The property belonging to the idiot shall not be handed over to him unless his mental maturity is established. If there is doubt about his condition, he shall be duly tested, for example, by

يختبر، بأن يفوض إليه مدة معتداًبهابعض الأمورممايناسب شأنه كالبيع و الشراء و الاجارة و الاستئجار لمن يناسبه مثل هذه الأمور، و الرتق و الفتق في بعض الأمور، مثل مباشرة الانفاق في مصالحه و مصالح الولي و نحو ذلك فيمن يناسبه ذلك ، و في السفيهة يفوض إليها ما يناسب النساء من إدارة بعض مصالح البيت و المعاملة مع النساء من الاجارة و الاستئجار للخياطة أو الغزل أو النساجة و أمثال ذلك ، فان آنس منه الرشد بأن رأى منه المداقة و المكايسة و التحفظ عن المغابنة في معاملاته وصيانة المال من التضييع و صرفه في موضعه و جريه مجرى العقلاء دفع اليه ما له و إلا فلا.

مسألة ١١ ـ لو احتمل حصول الرشد للصبي قبل بلوغه يجب اختباره قبله ليسلّم إليه ما له بمجرد بلوغه لو آنس منه الرشد، و إلا ففي كل زمان احتمل فيه ذلك عند البلوغ أو بعده، و أما غيره فان ادعى حصول الرشد له و احتمله الولي يجب اختباره، و إن لم يدع حصوله ففي وجوب الاختبار بمجرد الاحتمال إشكال لا يخلو عدمه من قوة.

القول في الفلس

المفلس من حجر عليه عن ماله لقصوره عن ديونه.

مسألة ١ ـ من كثرت عليه الديون ولو كانت أضعاف أمواله يجوز له التصرف فيها بأنواعه، و نفذ أمره فيها بأصنافه ولو باخراجها جميعاً عن ملكه مجاناً أو بعوض ما لم يحجر عليه الحاكم الشرعي، نعم لو كان صلحه عنها أو هبتها مثلاً لأجل الفرار من أداء الديون يشكل الصحة خصوصاً فيما إذا لم يرج حصول مال آخر له باكتساب و نحوه.

مسألة ٢ ـ لا يجوز الحجر على المفلس إلا بشروط أربعة: الأول ـ أن تكون ديونه ثابتة شرعاً، الثاني ـ أن تكون أمواله من عروض و نقود و منافع و ديون على

entrusting to him for a considerable time some of the affairs suitable for his position as sale, purchase, lease or hiring with a person deemed fit for such matters, and handle management of some matters, as conducting expenditure in matters beneficial for him and the guardian, or the like with those who are suitable for such dealings. In case of an idiot female, she may be entrusted something suitable for women as the management of the domestic chores or dealings with other women like hiring or accepting on hire something for tailoring, spinning, weaving or the like. If it is observed that the idiot performs all these matters with sagacity, carefulness and safeguard against deceit in dealings, protection of the property against wastage and spending it in the manner exercised by normal persons, his/her property may be handed over to him/her; otherwise, not.

Problem # 11. If there is likelihood of an idiot resuming mental maturity before attaining physical maturity, he shall be put to test before hand, so that his property may be handed over to him as soon as he attains the mental maturity, or he may be put to test any time whenever there is such likelihood before or after attaining to the physical maturity. If it is claimed by claimed by a person other than the guardian that the idiot has attained mental maturity, the guardian shall be bound to put him to test if he also finds it to be likely. If no one has made such claims, there shall be hesitation in making the guardian bound to put the idiot on test as son as there is likelihood, and the absence of it is not free from force.

Chapter Three – Insolvency (*Iflās*)

An Insolvent (*Muflis*) is a person who is interdicted from dealing with his property due to his failure [to clear] his debts.

Problem # 1. If a person is under several debts, he may have all types of dealings with his property, even if the aggregate of the debts is many times more than his property, and any change what so ever made in his property shall be effective, even if he removes his total property from his ownership with or without any consideration, as long as he is not under an interdiction imposed by a judge. Of course, if its conveyance or gift by him is intended, for example, in order to escape from payment of debts, there shall be hesitation in the validity of such transactions, particularly in case he does not expect to obtain any other property through gaining profit or the like

Problem # 2. Interdiction is not allowed in case of an Insolvent except in the following four conditions:

1. If the debts are proven by law.
2. Besides the exceptions of debts, his property like merchandise, cash money, profits, debts owed by people may not be sufficient to set off his debts.
3. The debts must be payable promptly. If the payment of his debts is deferred, he shall not be

الناس ـما عدا مستثنيات الدين ـ قاصرة عن ديونه، الثالث ـ أن تكون الديون حالّةً، فلا يحجر عليه لأجل الديون المؤجلة و إن لم يف ما له بها لو حلّت، ولو كان بعضها حالاً و بعضها مؤجلاً فان قصر ما له عن الحالة يحجر عليه و إلا فلا. الرابع ـ أن يرجع الغرماء كلهم أو بعضهم إذا لم يف ما له بدين ذلك البعض إلى الحاكم و يلتمسوا منه الحجر عليه إلا أن يكون الدين لمن كان الحاكم و ليه كالمجنون و اليتيم.

مسألة ٣ ـ بعد ما تمت الشرائط و حجر عليه الحاكم و حكم به تعلق حق الغرماء بأمواله، و لا يجوز له التصرف فيها بعوض كالبيع و الاجارة و بغيره كالوقف و الهبة إلا باذنهم أو إجازتهم، و انما يمنع عن التصرفات الابتدائية، فلو اشترى شيئاً سابقاً بخيار ثم حجر عليه فالخيار باق، و له فسخ البيع و اجازته، نعم لو كان له حق مالي سابقاً على الغير ليس له اسقاطه وابراؤه كلاً أو بعضاً.

مسألة ٤ ـ انما يمنع عن التصرف في أمواله الموجودة في زمان الحجر عليه، و أما الأموال المتجددة الحاصلة له بغير اختياره كالارث أو باختياره كالاحتطاب و الاصطياد و قبول الوصية و الهبة و نحو ذلك ففي شمول الحجر لها بل في نفوذه على فرض شموله إشكال، نعم لا اشكال في جواز الحجر عليها أيضاً.

مسألة ٥ ـ لو أقر بعد الحجر بدين صحّ و نفذ، لكن لا يشارك المقر له مع الغرماء على الأقوى، سواء كان الاقرار بدين سابق أو بدين لاحق، و سواء أسنده الى سبب لا يحتاج الى رضا الطرفين مثل الا تلاف و الجناية و نحو هما أو أسنده الى سبب يحتاج الى ذلك كالاقتراض و الشراء بما في الذمة و نحو ذلك.

مسألة ٦ ـ لو أقرّ بعين من الأعيان التي تحت يده لشخص لا اشكال في نفوذ اقراره في حقه، فلو سقط حق الغرماء و انفك الحجر لزمه تسليمها الى المقر له أخذاً باقراره، و أما نفوذه في حق الغرماء بحيث تدفع الى المقر له في الحال ففيه إشكال، و الأقوى عدمه.

مسألة ٧ ـ بعد ما حكم الحاكم بحجر المفلس و منعه عن التصرف في أمواله

interdicted, even if after the arrival of their maturity time, his assets may not suffice for payment of the debts. If some of the debts are prompt and some deferred, and his property is not sufficient for the payment of the prompt debts, interdiction shall be imposed on him, otherwise not.

4. If all or some of the creditors file a suit with a judge for imposition of interdiction on the debtor when his assets do not suffice for the payment of their debts owed by him, except when the debt is payable to someone whose guardian is the judge himself, as a lunatic or an orphan.

Problem # 3. After the completion of the conditions, imposition of the interdiction on the debtor and issuance of the judge's order, the debtor's property shall belong to the creditors. And the debtor shall not be allowed to make any dealing in respect of his assets against any consideration like sale or lease, or without any consideration like endowment or free gift except with the permission or consent of the creditors. After the imposition of interdiction, the person shall not be allowed to initiate any dealing [in respect of his assets]. But if he has purchased something previous to the imposition of the interdiction with the right of option, and subsequently interdiction is imposed on him, the right of option shall remain intact, and he shall be entitled to revoke the sale or endorse it. Of course, if he has some financial liability on some one previous to the imposition of the interdiction, he shall not be entitled to drop it or absolve him of the liability partly or wholly.

Problem # 4. An interdicted person is forbidden from making any dealing in respect of his assets existing at the time of the imposition of the interdiction. But with regard to the inclusion of property obtained by him subsequent to the imposition of interdiction involuntarily, as ar inheritance, or voluntarily as collection of fuel or hunting, or accepting a legacy, free gift or the like, or even if it is supposed that it is included, then with regard to its enforcement, there is hesitation. Of course, the interdicted person may be forbidden to deal with such objects as well.

Problem # 5. If subsequent to the imposition of the interdiction, the interdicted person acknowledges a debt, it is shall be valid and enforced, but, according to the stronger opinion, the person in whose favour he has made the acknowledgement [of debt] shall not share with the other creditors, regardless whether the acknowledgement relates to a debt prior or subsequent to the imposition of the interdiction, and regardless whether it is based on a cause not requiring consent of both the parties like the destruction of an object or perpetration of injustice or the like, or it is based on a cause requiring consent of both the parties as borrowing or purchase something on one's own liability, or the like.

Problem # 6. If an interdicted person acknowledges one of the assets in his possession to belong to another, there shall be no objection in its enforcement in favour of that person. If the right of the creditors is dropped and the interdiction is revoked, he shall be liable to deliver the asset to that person. As regards its enforcement by the creditors in a way that they be obliged to deliver the asset to that person, there is hesitation in it, and, according to the stronger opinion it shall not be enforceable.

Problem # 7. After the judge has issued order for the interdiction of the Insolvent and forbidden him to deal with his assets, he shall start disposing off the asset and dividing the sale proceeds among the creditors in shares proportionate to their respective debts excluding the exceptions of the debts that have already been mentioned under the Section on Debts, and also excluding the assets mortgaged

يشرع في بيعها و قسمتها بين الغرماء بالحصص و على نسبة ديونهم مستثنياً منها مستثنيات الدين، و قد مرت في كتاب الدين، و كذا أمواله المرهونة عند الديان، فان المرتهن أحق باستيفاء حقه من الرهن الذي عنده و لا يحاصّه فيه سائر الغرماء، كما مر في كتاب الرهن.

مسألة ٨ - إن كان من جملة مال المفلس عين اشتراها و كان ثمنها في ذمته كان البائع بالخيار بين أن يفسخ البيع و يأخذ عين ما له و بين الضرب مع الغرماء بالثمن ولو لم يكن له مال سواها.

مسألة ٩ - الظاهر أن هذا الخيار ليس على الفور، فله أن لا يبادر بالفسخ و الرجوع بالعين، نعم ليس له الافراط في تأخير الاختيار بحيث تعطل أمر التقسيم على الغرماء، ولو وقع منه ذلك خيّره الحاكم بين الأمرين فان امتنع ضرّبه مع الغرماء بالثمن.

مسألة ١٠ - يعتبر في جواز رجوع البائع بالعين حلول الدين، فلا رجوع مع تأجيله، نعم لو حلّ المؤجل قبل فك الحجر فالأصح الرجوع بها.

مسألة ١١ - لو كانت العين من مستثنيات الدين ليس للبائع أن يرجع اليها على الأظهر.

مسألة ١٢ - المقرض كالبائع في أن له الرجوع في العين المقترضة لو وجدها عند المقترض، فهل للمؤجر فسخ الاجارة إذا حجر على المستأجر قبل استيفاء المنفعة كلاً أو بعضاً بالنسبة الى ما بقي من المدة؟ فيه إشكال، و الأحوط التخلّص بالصلح.

مسألة ١٣ - لو وجد البائع أو المقرض بعض العين المبيعة أو المقترضة كان لهما الرجوع الى الموجود بحصة من الدين و الضرب بالباقي مع الغرماء، كما أن لهما الضرب بتمام الدين معهم.

مسألة ١٤ - لو زادت في العين المبيعة أو المقترضة زيادة متصلة كالسمن تتبع الأصل، فيرجع البائع أو المقرض الى العين كما هي، و أما الزيادة المنفصلة

with creditors, as a mortgagee has a better title to the settlement of his mortgage by the asset in his possession which is not shared by other creditors, as has already been mentioned under the Section on Mortgage.

Problem # 8. If among the assets of the Insolvent there is an asset that he had purchased and whose price is still owed by the Insolvent, its seller shall have the option to revoke the sale and take hold of the asset itself even if the Insolvent has no property other than that, or share its price with the other creditors.

Problem # 9. Apparently this option is not prompt, and he is entitled not to expedite the revocation and get back the asset [belonging to him].

Of course, however, he must not delay the execution of his option in a way that it may unduly prolong the matter of division of the assets among the creditors. In case of such an event, the judge shall give him to make either of the options.

In case of his failure, the judge shall appoint him as one of the partners of the creditors in the price [of the asset].

Problem # 10. As regards the permission for the seller to get back the asset, it is a condition that the time of maturity of the debt must have reached. If the debt is a deferred one, he shall have no such title. Of course, if the time of maturity reaches before the revocation of the interdiction, then it shall be more proper to say that the seller shall be entitled to get back the asset.

Problem # 11. If the asset is one of the exceptions of the debt, according to the opinion in keeping with the traditional authority the seller shall not be entitled to get it back.

Problem # 12. A lender is like a seller in so far as he has the right of getting back the asset lent if he finds it with the borrower. Now, as regards the question whether a lessor is entitled to revoke the lease for the remaining period of the lease, if the tenant is interdicted before he has enjoyed the benefit of lease partly or wholly, there is hesitation in it, and it is more cautious [for the parties] to reach a compromise.

Problem # 13. If the seller or lender finds some of the asset sold or lent, he shall be entitled to get back the existing asset as part of the debt and agree to share the other creditors for the rest, in the same way as he shall be entitle to agree to share the creditors for the whole of their debt.

Problem # 14. If something has added to the sold or lent object as a part of it, as fatness that is part of the principal object, the seller or lender shall get back the object as it is. But as regards a separate addition or excess as a foetus or offspring, milk, or fruits on a tree, they shall belong to the buyer or the borrower.

كالحمل والولد و اللبن و الثمر على الشجر فهي للمشتري و المقترض.

مسألة ١٥ تعيبت العين عندالمشتري مثلاً فان كان بآفة سماوية أو بفعل المشتري ... ئع أن يأخذها كما هي بدل الثمن و أن يضرب بالثمن مع الغرماء، و ان ... بفعل الأجنبي فهو بالخيار بين أن يضرب مع الغرماء بتمام الثمن و بين أن ...ذ العين معيباً، و حينئذ يحتمل أن يضارب الغرماء في جزء من الثمن نسبته ... كنسبة الأرش الى قيمة العين، و يحتمل أن يضاربهم في تمام الأرش، فاذ، كان الثمن عشرة و قيمة العين عشرين و أرش النقصان أربعة: خمس القيمة فعلى الأول يضاربهم في إثنين، و على الثاني في أربعة، ولو فرض العكس بأن كان الثمن عشرين و القيمة عشرة و كان الأرش إثنين: خمس العشرة فالأمر بالعكس، يضاربهم في أربعة على الأول، و في إثنين على الثاني، و يحتمل أن يكون له أخذها كما هي، و الضرب بالثمن كالتلف السماوي، ولو كان التلف بفعل البائع فالظاهر أنه كفعل الأجنبي و يكون ما في عهدته من ضمان المبيع المعيب جزء أموال المفلس، و المسألة مشكلة، فالأحوط التخلص بالصلح.

مسألة ١٦ ـ لو اشترى أرضاً فأحدث فيها بناء أو غرساً ثم فلس كان للبائع الرجوع إلى أرضه، لكن البناء و الغرس للمشتري، و ليس له حق البقاء ولو بالأجرة، فان تراضيا مجاناً أو بالأجرة، و إلا فللبائع إلزامه بالقلع لكن مع دفع الأرش، كما أن للمشتري القلع لكن مع طم الحفر، والأحوط للبائع عدم إلزامه بالقلع والرضا ببقائه ولو بالأجرة إذا أراده المشتري، وأحوط منه الرضا بالبقاء بغير أجرة.

مسألة ١٧ ـ لو خلط المشتري مثلاً ما اشتراه بماله خلطاً رافعاً للتميز فالأقرب بطلان حق البائع، فليس له الرجوع إليه، سواء اختلط بغير جنسه أو بجنسه، و سواء خلط بالمساوي أو الأردأ أو الأجود.

مسألة ١٨ ـ لو اشترى غزلاً فنسجه أو دقيقاً فخبزه أو ثوباً فقصره أو صبغه لم يبطل حق البائع من العين على إشكال في الأولين.

مسألة ١٩ ـ غريم الميت كغريم المفلس، فاذا وجد عين ما له في تركته كان له

Problem # 15. If the object of sale is damaged while in the possession of the buyer, then if the damage has been caused due to an Act of God or by an act of the buyer, the seller shall have the option either to get it back as it is in return for its price, or share with other creditors for the price. If the damage was caused by an act of a stranger, he shall have the option either to share with other creditors for the whole price [of the object of sale], or get back the damaged object. In such case, it is likely that he may share with other creditors for part of the price [of the object of sale] in the same proportion as that of the indemnity to the price of the object itself. It is also likely that he shares with the other creditors in the entire indemnity. Now if the price of the object of sale is ten [Dīnārs] and its price is twenty [Dīnārs], while the indemnity is four [Dīnārs] or one-fifth of the actual price, then in the light of the former likelihood he would share with the other creditors in two [Dīnārs], while in the light of the latter likelihood, he would share with them in four [Dīnārs]. If it is supposed conversely, that the price of the object is twenty [Dīnārs], while its actual price is ten [Dīnārs] and the indemnity being two [Dīnārs], or one-fifth of the actual price, then case shall be reverse, so that they would share in four [Dīnārs] in the former likelihood, while they would share in two [Dīnārs] in the latter likelihood. It is also likely that he gets back the object as it is, and share with the other creditors for the price, as would be the case in case it is damaged by an Act of God. If the damage is caused by an act of the seller, then apparently it would be like an act of a stranger, and the amount guaranteed by him in the damaged object shall be counted as part of the insolvent's property. Anyhow, the problem is difficult to solve, and so it is more cautious to be solved by reaching a compromise.

Problem # 16. If a person purchases a piece of land, and erects a building on it, or plants some trees in it, and then he suffers insolvency, the seller shall be entitled to get back his land, but the building or the plantation shall belong to the buyer, but he shall not be entitled to retain the building or the plantation even after payment of compensation. If both the parties agree to the retention of the building or plantation, well and good. Otherwise, the seller shall be entitled to compel the buyer to remove the building or plantation, but against payment of compensation. Likewise, the buyer shall also be entitled to remove the building or plantation but by filling the pits. It is more cautious for the seller not to compel the buyer to remove the building or plantation, and agree with its retention, even against the receipt of compensation if the buyer intends to do so. It is more cautious on the part of the seller to agree with the retention of the building or plantation even without compensation.

Problem # 17. If the buyer mixes up the object purchased by him with his own property in a way that they cannot be distinguished from each other, then, it is closer to likelihood that the right of the seller shall be cancelled, and he shall not be entitled to demand it back from the buyer, regardless whether it is mixed up with its own kind or otherwise, and whether it is mixed up with some thing of an equal, inferior or superior quality.

Problem # 18. If person buys thread and then weaves a cloth with it, or flour and then bakes bread with it, or a cloth and bleaches or dyes it, the right of the seller to demand its return shall not drop though there is hesitation in the first two cases.

Problem # 19. The creditor of a deceased person is like that of an insolvent person. He can get back his object sold if he finds it among the deceased's property, provided that the deceased's property is sufficient to meet the demand of the creditor; otherwise, he shall not be entitled to get it back, and he

الرجوع إليه، لكن بشرط أن يكون ما تركه وافياً بدين الغرماء، و إلا فليس له ذلك، بل هو كسائر الغرماء يضرب بدينه معهم وإن كان الميت قدمات محجوراً عليه.

مسألة ٢٠ ـ يجري على المفلس إلى يوم قسمة ماله نفقته و كسوته و نفقة من يجب عليه نفقته و كسوته على ما جرت عليه عادته، ولو مات قدم كفنه بل وسائر مؤن تجهيزه من السدر و الكافور وماء الغسل و نحو ذلك على حقوق الغرماء، و يقتصر على الواجب على الأحوط، و إن كان القول باعتبار المتعارف بالنسبة إلى أمثاله لا يخلو من قوة خصوصاً في الكفن.

مسألة ٢١ ـ لو قسم الحاكم مال المفلس بين الغرماء ثم ظهر غريم آخر فالأقوى انكشاف بطلان القسمة من رأس، فيصير المال للغرماء أجمع بالنسبة.

القول في المرض

المريض إن لم يتصل مرضه بموته فهو كالصحيح يتصرف في ماله بما شاء و كيف شاء، و ينفذ جميع تصرفاته في جميع ما يملكه إلا إذا أوصى بشيء من ما له بعد موته، فانه لا ينفذ فيما زاد على ثلث تركته، كما أن الصحيح أيضاً كذلك، و يأتي تفصيله في محله إن شاء الله تعالى، و أما إذا اتصل مرضه بموته فلا إشكال في عدم نفوذ وصيته بما زاد على الثلث كغيره، كما أنه لا إشكال في نفوذ عقوده المعاوضية المتعلقة بماله كالبيع بثمن المثل و الاجارة بأجرة المثل و نحو ذلك، و كذا لا إشكال في جواز انتفاعه بماله كالأكل و الشرب والا نفاق على نفسه و من يعوله و الصرف على أضيافه، و في مورد يحفظ شأنه و اعتباره و غير ذلك، و بالجملة كل صرف فيه غرض عقلائي مما لا يعد سرفاً و لا تبذيراً أيّ مقدار كان، و انما الأشكال و الخلاف في مثل الهبة و الوقف و الصدقة و الإبراء و الصلح بغير عوض و نحو ذلك من التصرفات التبرعية في ما له مما لا يقابل بالعوض و يكون فيه إضرار بالورثة، و هي المعبر عنها بالمنجزات. و أنها هل هي

shall be like other creditors and share with them for his debt, even if the deceased has died while still under interdiction.

Problem # 20. The expenses on maintenance and clothing of an insolvent person and of those whose maintenance and clothing is his liability according to his usual practice shall be defrayed until the division of his property [among the creditors]. In case he happens to die, the cost of his shroud, rather all the other expenses on his burial including the leaves of the lotus tree, camphor and water for washing his dead body, and the like, shall be given preference over the dues of the creditors. According to the more cautious opinion, these expenses must be confined to what is required necessarily, although the opinion regarding the observance of whatever is observed in case of his equals is not devoid of force, particular in respect of his shroud.

Problem # 21. If the judge divides the property of the insolvent person among the creditors, and then appears another creditor, according to the stronger opinion, the division shall be declared void ab initio, and the property shall be divided among all the creditors proportionately.

Chapter Four – Rules Concerning Ailment

If a sick person's ailment does not result in death, he may dispose off his property as and wherever he likes, and all his actions in respect of his property shall be enforceable, except what he decrees by will for anything out of his property to be executed after his death, as it shall not be fulfilled in respect of what exceeds one-third of the property left by him, as is also the case with the will made by a sound person, the details of which, God willing, shall follow in its proper place. If the ailment of a sick person results in his death, then, like a sound person, there is no hesitation in the non-enforcement of his will in respect of what exceeds one-third of the property left by him, as is the case a person other than him [i.e., a sound person], in the same way as there is no hesitation in the enforcement of his commutative contracts involving his property, as sale against a proper price or a lease against a proper rent, or the like. Likewise, there is no hesitation in the permissibility of utilisation of his property by him by eating, drinking, or spending on himself, his family or guests in order to save his honour and dignity, and the like, in short as regards all expenditures for a reasonable purpose that may not be considered extravagance and squandering, to whatever extent the expenditures may be. However, there is hesitation and difference of opinion in the permissibility of a free gift, endowment, charity, remission of debt (*Ibrā'*), non-commutative conveyance, and the other similar acts of donations involving his property that are of a non-commutative nature and may be detrimental to the heirs' interests, as are known as *Munajjazāt* in legal terminology. In such acts, it is to be seen whether they are to be enforced out of the actual property in the sense of their general enforcement and validity, even if it exceeds one-third of his property, rather, even if they comprehend the total property in a way that nothing is left for the heirs, or they are enforceable to the extent of one-third [of the property left by him], so that if the amount exceeds

نافذة من الأصل بمعنى نفوذها و صحتها مطلقا و إن زادت على ثلث ما له بل و إن تعلقت بجميعه بحيث لم يبق شيء للورثة أو هي نافذة بمقدار الثلث فان زادت تتوقف صحتها و نفوذها في الزائد على إمضاء الورثة؟ و الأقوى هو الأول.

مسألة ١ - لا إشكال و لا خلاف في أن الواجبات المالية التي يؤديها المريض في مرض موته كالخمس و الزكاة و الكفارات تخرج من الأصل.

مسألة ٢ - لو أقر بدين أو عين من ما له في مرض موته لوارث أو أجنبي فان كان مأموناً غير متهم نفذ إقراره في جميع ما أقر به و إن كان زائداً على ثلث ما له بل و ان استوعبه، و إلا فلا ينفذ فيما زاد على ثلثه، و المراد بكونه متهماً وجود أمارات يظن معها بكذبه، كأن يكون بينه و بين الورثة معاداة يظن معها بأنه يريد بذلك إضرارهم، أو كان له حبّ شديد بالنسبة إلى المقرّ له يظن معه بأنه يريد بذلك نفعه.

مسألة ٣ - لو لم يعلم حال المقرّ و أنه كان متهماً أو مأموناً فالأقوى عدم نفوذ إقراره في الزائد على الثلث، و إن كان الأحوط التصالح بين الورثة و المقرّ له.

مسألة ٤ - انما يحسب الثلث في الاقرار و نحوه بالنسبة إلى مجموع مايتركه في زمان موته من الأموال عيناً أو ديناً أو منفعة أو حقاً مالياً يبذل بازائه المال كحق التحجير، و هل تحسب الدية من التركة و تضم إليها و يحسب الثلث بالنسبة إلى المجموع أم لا؟ و جهان بل قولان لا يخلو أولهما من رجحان.

مسألة ٥ - ما ذكر من عدم النفوذ فيما زاد على الثلث في الوصية و نحوها انما هو مع عدم إجازة الورثة، و إلا نفذت بلا إشكال، ولو أجاز بعضهم نفذت بمقدار حصته، ولو أجازوا بعضاً من الزائد على الثلث نفذت بمقداره.

مسألة ٦ - لا إشكال في صحة إجازة الوارث بعد موت المورث، و هل تصح منه في حال حياته بحيث تلزم عليه و لا يجوز له الردّ بعد ذلك أم لا؟ قولان، أقواهما الأول خصوصاً في الوصية، ولو ردّ في حال الحياة يمكن أن تلحقها الاجازة بعد ذلك على الأقوى.

[the one-third], their validity and enforcement as to the excess amount shall be subject to the subsequent endorsement by the heirs. The stronger opinion is the former one.

Problem # 1. There is no hesitation or difference opinion in that the financial dues paid by the sick person during his ailment resulting in his death like *Khums*, *Zakāt* and expiations (*Kaffārāt*) are to be deducted from the original property.

Problem # 2. If a sick person acknowledges a debt or a real estate out of his property to belong to an heir or a stranger during an ailment resulting in his death, his acknowledgement shall be executed entirely even if it involves what exceeds one-third of his property, rather even if comprehends the whole property, provided that he has not been accused of falsehood in the past; otherwise, it shall not be enforceable as far as it involves what exceeds one-third [of the property]. By accusation here are meant indications leading to his falsehood, or there being an enmity between him and the heirs leading to the presumption that he intends thereby to harm them, or there has been an extreme attachment with the acknowledgee leading to the presumption that he intends thereby to benefit him.

Problem # 3. If there is no knowledge about the actual position of the acknowledger as to his being accused of falsehood or free from any such accusation, then according to the stronger opinion, his acknowledgment involving what exceeds one-third [of his property] shall not be enforced, although it is more cautious to reach a compromise between heirs and acknowledgee.

Problem # 4. In case of an acknowledgement or the like, one-third of the property shall be reckoned in relation to the whole property left by the deceased at the time of his death including a real estate, debt, usufruct, or a financial title that involves monetary payment in exchange thereof, the title for *Taḥjīr* (occupation of a barren land). Whether *Diyat* (blood-money or indemnity for bodily injury)is reckoned a part of the deceased's property and is merged with it, and the one-third is to be reckoned out of the whole property or not, is a question in which there are two alternatives, rather two opinions, the former of them is not devoid of preference.

Problem # 5. Whatever has been said above about the non-enforcement of what involves an amount exceeding one-third in a will or the like, is without the permission of the heirs; otherwise, it shall be enforced without hesitation. If an heir permits it, it shall be enforced to the extent of his share. If the heirs sanction a part of the excess, it may be enforced only up to that extent.

Problem # 6. There is no hesitation in the validity of an heir's permission after the death of the propositus (*Mūrith*) or legator. Is it valid if given during the latter's lifetime, so that it would be binding on him and it would not be permissible for him to cancel it subsequently, or not, is a question on which there are two opinion, the stronger being in favour of the former, particularly in case of a will. If a person cancels his permission during the lifetime of the *Mūrith*, according to the stronger opinion, he may give permission subsequently.

كتاب الضمان

و هو التعهد بمال ثابت في ذمة شخص لآخر. و هو عقد يحتاج إلى الايجاب من الضامن بكل لفظ دال عرفاً ولو بقرينة على التعهد المزبور، مثل ضمنت أو تعهدت لك الدين الذي لك على فلان و نحو ذلك، و قبول من المضمون له بما دل على الرضا بذلك، و لا يعتبر فيه رضا المضمون عنه.

مسألة ١ ـ يشترط في كل من الضامن و المضمون له أن يكون بالغاً عاقلاً رشيداً مختاراً، و في خصوص المضمون له أن يكون غير محجور عليه لفلس.

مسألة ٢ ـ يشترط في صحة الضمان أمور:

منها ـ التنجيز على الأحوط، فلو علق على أمر كأن يقول: أنا ضامن إن أذن أبي أو أنا ضامن إن لم يف المديون إلى زمان كذا أو إن لم يف أصلاً بطل.

و منها ـ كون الدين الذي يضمنه ثابتاً في ذمة المضمون عنه، سواء كان مستقراً كالقرض و الثمن والمثمن في البيع الذي لا خيار فيه أو متزلزلاً كأحد العوضين في البيع الخياري و المهر قبل الدخول و نحو ذلك، فلو قال أقرض فلاناً أو بعه نسيئة و أنا ضامن لم يصح.

و منها ـ تميز الدين و المضمون له و المضمون عنه بمعنى عدم الابهام و الترديد، فلا يصح ضمان أحد الدينين ولو لشخص معين على شخص معين، و لا

SECTION - TWENTY - FOUR

GUARANTY *(ḌAMĀN)*

Guaranty is a promise to pay money established to be owed to someone by another [in case of the latter's default). It is a contract requiring a Declaration by the Guarantor in any form or words even by conduct denoting the said promise, as: "I have guaranteed or promised you to pay your debt owed to you by such person", or the like, according to the prevalent custom, and an Acceptance by the person to whom the Guaranty is made expressing his consent with it, but it is not a condition in such contract to obtain the consent of the person for whom the Guaranty is made.

Problem # 1. It is a condition for both the Guarantor and the person to whom Guaranty is made that they must be adult, sane, discreet and having free will, and particularly for the person to whom Guaranty is made that he must not be interdicted due to insolvency.

Problem # 2. There are some conditions required for the validity of a Guaranty. They are as follows: Firstly, to be more cautious, it must not be conditional. If it is made contingent on a condition, as, for example, he says : "I am a Guarantor if my father permits," or " I shall be a Guarantor if the debtor fails to pay the debt until such time, or fails to pay the debt at all," the Guaranty shall be void.

Secondly, the debt must be established to be owed by the person for whom the Guaranty is made, regardless whether it is stable as a loan, the price in a transaction, or the object sold without an option, or unstable as either of the alternatives [namely, price of the commodity or the commodity itself] in an optional sale, dower prior to consummation, or the like. If a person says: "Give a loan to such person or sell to him on credit, and I stand a guarantee [for its payment]," it shall not be valid.

Thirdly, specifying the debt, the person to whom the Guaranty is made as well as the person for whom the Guaranty is made in order to avoid every confusion and doubt. So it is not valid to make a Guaranty for "one of the two debts," even if it made to a specific person and for a specific person, nor a Guaranty for a debt of 'one of the two persons," even if it is made to a single specified person and for a single specified person. Of course, if the debt is actually a specific one but its description or amount is not known, or the person to whom the Guaranty is made or for whom the Guaranty is made is actually a specific person but his description is not known, according to the stronger opinion, it shall be a valid Guaranty, particularly in case of the latter two. So if a person says: "I stand guarantee for what is owed

ضمان دين أحد الشخصين ولو لواحد معين أو على واحد معين، نعم لو كان الدين معيناً في الواقع و لم يعلم جنسه أو مقداره أو كان المضمون له أو المضمون عنه متعيناً في الواقع و لم يعلم شخصه صح على الأقوى خصوصاً في الأخيرين، فلو قال: ضمنت ما لفلان على فلان و لم يعلم أنه درهم أو دينار أو أنه دينار أو ديناران صح على الأصح، و كذا لو قال: ضمنت الدين الذي على فلان لمن يطلبه من هؤلاء العشرة و يعلم بأن واحداً منهم يطلبه و لم يعلم شخصه ثم قبل المطالب أو قال: ضمنت ما كان لفلان على المديون من هؤلاء و لم يعلم شخصه صح الضمان على الأقوى.

مسألة ٣ ـ إذا تحقق الضمان الجامع للشرائط انتقل الحق من ذمة المضمون عنه إلى ذمة الضامن، و برأت ذمته، فاذا أبرأ المضمون له ذمة الضامن برأت الذمتان إحداهما بالضمان و الأخرى بالإبراء، ولو أبرأ ذمة المضمون عنه كان لغواً.

مسألة ٤ ـ الضمان لازم من طرف الضامن، فليس له فسخه بعد وقوعه مطلقا، و كذا من طرف المضمون له إلا إذا كان الضامن معسراً و هو جاهل باعساره، فله فسخه و الرجوع بحقه على المضمون عنه، و المدار إعساره حال الضمان، فلو أعسر بعده فلا خيار، كما أنه لو كان معسراً حاله ثم أيسر لم يزل الخيار.

مسألة ٥ ـ يجوز اشتراط الخيار لكل من الضامن و المضمون له على الأقوى.

مسألة ٦ ـ يجوز ضمان الدين الحال حالاً و مؤجلاً، و كذا ضمان المؤجل مؤجلا و حالاً، و كذا يجوز ضمان المؤجل بأزيد أو أنقص من أجله.

مسألة ٧ ـ لو ضمن من دون إذن المضمون عنه ليس له الرجوع عليه، و إن كان باذنه فله ذلك لكن بعد أداء الدين لا بمجرد الضمان، و انما يرجع إليه بمقدار ما أداه، فلو صالح المضمون له مع الضامن الدين ببعضه أو أبرأه من بعضه لم يرجع بالمقدار الذي سقط عن ذمته بها.

to such person by such person," although it is known whether it is a Dirham or Dīnār, or whether it is one or two Dīnārs, according to the more genuine opinion, it shall be a valid Guaranty. Likewise, if he says : "I stand guarantee the debt owed by such person to one of those ten persons," while it is known that it is owed to one of them, but he is not known specifically, provided the person to whom it is made makes the Acceptance, [it shall be valid]. Similarly, if a person says: "I stand guarantee to such person for what is owed by one of those persons," although the person is not specifically known, according to the stronger opinion, it shall be a valid Guaranty.

Problem # 3. After the execution of a Guaranty fulfilling all the required conditions, the liability shall be shifted from the person for whom the Guaranty is made to the Guarantor, and the former shall be relieved of the liability. If the person to whom the Guaranty is releases the Guarantor from his liability, thereby both the Guarantor and the person for whom the Guarantee is made shall be released of their respective liabilities, one through the Guaranty and the other by the remission of the debt. If the creditor releases only the person for whom the Guaranty is made, it shall be ineffective, [so that neither shall thereby be released of the respective liabilities].

Problem # 4. A Guaranty is binding so far as the Guarantor is concerned, and he shall not at all be entitled to rescind it. Likewise, it is also binding for the person to whom it is made, except when the Guarantor happens to be a destitute, but he were ignorant of it, in which case he shall be entitled to cancel the Guaranty and have recourse to the person for whom the Guaranty has been made for the recovery of his debt. The criterion of the destitution is that it must be at the time of making the Guaranty. If it occurs after making the Guaranty, he shall have no such option, as when the Guarantor were a destitute at the time of making the Guaranty but subsequently he becomes well-off, the creditor shall not be deprived of the right of option.

Problem # 5. According to the stronger opinion, it is permissible for both the Guarantor and the Creditor to stipulate option to rescind the Guaranty [in the contract].

Problem # 6. In a prompt debt, a Guaranty may be made prompt or deferred. Similarly, in a deferred debt, a Guaranty may be made prompt or deferred. Likewise, in case of a deferred Guaranty, its time of maturity may be reduced or extended.

Problem # 7. If a person makes a Guaranty without the permission of the debtor, he shall not be entitled to have recourse against him. In case, however, he makes it with the permission of the debtor, he shall have such right, but after the repayment of the debt, and not merely after the execution of the Guaranty. He is entitled to have recourse against the debtor for the payment of the amount actually repaid by him. If the creditor reaches a compromise with the Guarantor of the debt for paying a part of it or absolves him from paying a part of it, the Guarantor shall not be entitled to demand what has been dropped from his liability by either way.

مسألة ٨ ـ لو كان الضمان باذن المضمون عنه فانما يرجع عليه بالأداء فيما إذا حل أجل الدين الذي كان على المضمون عنه، و إلا فليس له الرجوع عليه إلا بعد حلول أجله، فلو ضمن الدين المؤجل حالاً أو المؤجل بأقل من أجله فأداه ليس له الرجوع عليه إلا بعد حلول الأجل، نعم لو أذن له صريحاً بضمانه حالاً أو بأقل من الأجل فالأقرب جواز الرجوع عليه مع أدائه، و أما لو كان بالعكس بأن ضمن الحال مؤجلاً أو المؤجل بأكثر من أجله برضا المضمون عنه قبل حلول أجله جاز له الرجوع عليه بمجرد الأداء في الحال، و بحلول الأجل فيما ضمن بالأكثر بشرط الأداء و كذا لومات قبل انقضاء الأجل فحل الدين بموته و أدّاه الورثة من تركته كان لهم الرجوع على المضمون عنه.

مسألة ٩ ـ لو ضمن بالاذن الدين المؤجل مؤجلاً فمات قبل انقضاء الأجلين و حلّ ما عليه فأخذ من تركته ليس لورثته الرجوع على المضمون عنه إلا بعد حلول أجل الدين الذي كان عليه، و لا يحل الدين بالنسبة الى المضمون عنه بموت الضامن، وانما يحل بالنسبة اليه.

مسألة ١٠ ـ لو دفع المضمون عنه الدين الى المضمون له من دون إذن الضامن برأت ذمته، و ليس له الرجوع عليه.

مسألة ١١ ـ يجوز الترامي في الضمان بأن يضمن مثلاً زيد عن عمرو ثم يضمن بكر عن زيد ثم يضمن خالد عن بكر و هكذا، فتبرأ ذمة الجميع و يستقر الدين على الضامن الأخير، فان كان جميع الضمانات بغير إذن من المضمون عنه لم يرجع واحد منهم على سابقه لو أدى الدين الضامن الأخير و ان كان جميعها بالاذن يرجع الأخير على سابقه و هو على سابقه الى أن ينتهي الى المديون الأصلي، و ان كان بعضها بالاذن دون بعض فان كان الأخير بدونه كان كالأول لم يرجع واحد منهم على سابقه، و ان كان بالاذن رجع هو على سابقه، و هو على سابقه لو ضمن بالاذن، و الا لم يرجع و انقطع الرجوع عليه، و بالجملة كل ضامن كان ضمانه باذن من ضمن عنه يرجع عليه بما أداه.

Problem # 8. If the Guaranty has been executed with the permission of the person for whom it is executed [or the debtor], then the Guarantor shall be entitled to have recourse to the debtor for the payment provided the amount of the Guaranty has already been paid by him and its time of repayment of the debt owed by the debtor has already matured. Otherwise, he shall not be entitled to have recourse to the debtor except after the arrival of the maturity time. If he has guaranteed to pay a deferred debt as prompt or a deferred debt to be paid before its maturity time, and pays it, he shall not be entitled to have recourse to the debtor except after the maturity time. Of course, if the debtor has given him express permission for his Guaranty whether it is prompt or payable before its maturity time, then, according to the opinion closer to the traditional authority, it shall be permissible for the Guarantor to have recourse to the debtor after its payment. If, however, the case is otherwise, that the Guarantor guarantees with the permission of debtor payment of a prompt one as deferred or a deferred one for later than the maturity time, it shall be permissible for him to have recourse to the debtor immediately after the payment of the Guaranty in case of a prompt one, while in case of the one that he has guaranteed for later than the maturity period, after its payment. The same shall be case if the Guarantor dies before the maturity of its time, when it turns into prompt, and his heirs makes its payment out of the deceased's property, the latter shall be entitled to have recourse against the debtor for payment.

Problem # 9. If a person guarantees with the permission of the debtor payment of a deferred debt as deferred, but dies before the maturity of both the periods, and consequently it turns into prompt, and is taken out of the deceased's property, his heirs shall not be entitled to have recourse against the debtor except after the maturity of its time for the repayment of the debt owed by the debtor, and the debt shall not turn into a prompt one in relation to the debtor in consequence of the Guarantor's death, but will only turn into a prompt one in relation to the Guarantor.

Problem # 10. If the debtor pays the debt the debt to the creditor without the permission of the Guarantor, the debtor shall be absolved of his liability, and the Guarantor shall not be entitled to have recourse to him for payment.

Problem # 11, Underwriting [*Tarāmī*] is allowed in a Guaranty, as when Zayd, suppose, guarantees for 'Umar, and then Bakr guarantees for Zayd, and then Khalid guarantees for Bakr, and so on, in which case all of them are absolved of their liability, and the liability for the debt falls on the last Guarantor. If all the Guaranties have been made without the permission of the [original] debtor, none of the Guarantors shall have the right of recourse against his predecessor, if the last Guarantor pays off the debt. If, however, the Guaranties were made with his permission, each of them shall have the right of recourse against his predecessor, until it reaches the original debtor. If some of them were made with permission but others not, if the last one was made without permission, it shall be treated as the former case, so that none of them shall have the right of recourse against his predecessor. If it was made with permission, he shall have the right against his predecessor, and he against his predecessor if he had made the Guaranty with his permission; otherwise not, and the right shall end on him. In short, every Guarantor who makes a Guaranty duly permitted by the guaranteed person shall have recourse against him.

مسألة ١٢ ـ لا إشكال في جواز ضمان اثنين عن واحد بالاشتراك بأن يكون على كل منهما بعض الدين فتشتغل ذمة كلٍ بمقدار ما عيناه ولو بالتفاوت، ولو أطلق يقسط عليهما بالتساوي، فبالنصف لو كانا اثنين و بالثلث لو كانوا ثلاثة و هكذا، و لكل منهما أداء ما عليه، وتبرأ ذمته، و لا يتوقف على أداء الآخر ما عليه، و للمضمون له مطالبة كل منهما بحصته أو أحدهما أو ابراؤه دون الآخر، ولو كان ضمان أحدهما بالاذن دون الآخر رجع المأذون الى المضمون عنه دون الآخر، و الظاهر أنه لا فرق في جميع ما ذكر بين أن يكون ضمانهما بعقدين بأن ضمن أحدهما عن نصفه ثم ضمن الآخر عن نصفه الآخر أو بعقد واحد كما إذا ضمن عنهما وكيلهما في ذلك تقبل المضمون له، هذا كله في ضمان اثنين عن واحد بالاشتراك ، و أما ضمانهما عنه بالاستقلال فلا اشكال في عدم وقوعه لكل منهما كذلك على ما يقتضي مذهبنا في الضمان، فهل يقع باطلاً أو يقسط عليهما بالاشتراك ؟ و جهان أقربهما الأول.

مسألة ١٣ ـ لو تم عقد الضمان على تمام الدين فلا يمكن أن يتعقبه آخر ولو ببعضه، ولو تم على بعضه لا يمكن أن يتعقبه على التمام أو على ذلك المضمون.

مسألة ١٤ ـ يجوز الضمان بغير جنس الدين، لكن اذا كان الضمان باذن المضمون عنه ليس له الرجوع عليه إلا بجنسه.

مسألة ١٥ ـ كما يجوز الضمان عن الأعيان الثابتة في الذمم يجوز عن المنافع و الأعمال المستقرة عليها، فكما يجوز أن يضمن عن المستأجر ما عليه من الأجرة كذلك يجوز أن يضمن عن الأجير ما عليه من العمل، نعم لو كان ما عليه اعتبر فيه المباشرة لم يصح ضمانه.

مسألة ١٦ ـ لو ادعى شخص على آخر ديناً فقال ثالث للمدعي: عليَّ ما عليه فرضي صح الضمان، بمعنى ثبوت الدين في ذمته على تقدير ثبوته، فتسقط الدعوى عن المضمون عنه و يصير الضامن طرفها، فلو أقام المدعي البينة على ثبوته يجب على الضامن أداؤه، و كذا لو ثبت إقرار المضمون عنه قبل الضمان بالدين،

Problem # 12. There is no objection in allowing a Guaranty made jointly by two persons for a single person, so that each of them should be liable for part of the debt, so that each of them shall be responsible for the payment of whatever he has specified, even if it were different from the other. If it is left unspecified, the liability shall be equally divided between them. The liability shall be half if they were two, a third if they were three, and so on. Each of them shall be liable for his own part, and shall be absolved of his liability by payment of his part, and shall not be required to wait until the payment by the other [or others] of his part [or their parts], and the person to whom the Guaranty has been made [or the creditor] shall have the right of recourse against each of them for the payment of his portion, or he may have recourse against one of them and excuse the other. If the Guaranty of one of them were executed with permission but not that of the other, the former shall have the right of recourse against the one for whom he has made the Guaranty, but not the other. Apparently there is no difference in whatever we have said here whether each of the two persons executes a separate Guaranty undertaking to pay half of the debt, and then the other for his other half, or both of them execute a single Guaranty, or similarly their agent executes the Guaranty and the person for whom it is executed gives his Acceptance. This is the case of a Guaranty jointly executed by two persons for a single person. As regards the Guaranty of two persons executed independently, there is no hesitation in declaring them as void, according to what is required by our faith in respect of a Guaranty. Whether they shall be declared void or the debt shall be equally divided between them, is a question in which there are two alternatives, the closer to the traditional authority being the former.

Problem # 13. If a Guaranty comprehends the entire amount of a debt, it shall not be possible to execute another even for part thereof. If it comprehends part of the debt, it shall not be possible to execute another for entire debt, or for the same amount already guaranteed.

Problem # 14. A Guaranty may be executed for a kind other than that of the debt, but if the Guaranty were executed with the permission of the person for whom it is executed,the Guarantor shall have no right of recourse against the debtor except for the kind of the debt.

Problem # 15. As Guaranty may be made for real estates establishing liabilities, likewise it may be made for usufructs and acts dependent on them. As Guaranty may be made for a tenant for the rent owed by him, likewise it may be made for a hireling for the labour owed by him.A Guaranty cannot be made if what is owed by a person is to be performed personally.

Problem # 16. If a person claims a debt owed by another, and a third person says to him: 'I am responsible for what is owed by him,' and the claimant agrees with it, the Guaranty shall be valid, in so far as the debt shall be established against him if it is supposed that it was established [in the first instance], so that the claim against the person for whom the Guaranty is made shall be dropped, the Guarantor shall become the party [by whom it is owed]. If the claimant adduces evidence in favour of

و أما إقراره بعد الضمان فلا يثبت به شيء لا على المقر و لا على الضامن.

مسألة ١٧ ـ الأقوى عدم جواز ضمان الأعيان المضمونة كالغصب و المقبوض بالعقد الفاسد لمالكها عمن كانت هي بيده.

مسألة ١٨ ـ لا إشكال في جواز ضمان عهدة الثمن للمشتري عن البائع لو ظهر المبيع مستحقاً للغير أو ظهر بطلان البيع لفقد شرط من شروط صحته إذا كان بعد قبض البائع الثمن و تلفه عنده، و أما مع بقائه ـ في يده فمحل تردد، و الأقوى عدم صحة ضمان درك ما يحدثه المشتري من بناء أو غرس في الأرض المشتراة إن ظهرت مستحقة للغير و قلعه المالك ـ للمشتري عن البائع.

مسألة ١٩ ـ لو كان على الدين الذي على المضمون عنه رهن ينفك بالضمان، شرط الضامن انفكاكه أم لا.

مسألة ٢٠ ـ لو كان على أحد دين فالتمس من غيره أداءه فأداه بلا ضمان عنه للدائن جاز له الرجوع على الملتمس مع عدم قصد التبرع.

his claim, the Guarantor shall be bound to make its payment. Similar shall be the case if the acknowledgement by the person for whom the Guaranty has been executed is proved before the execution of the Guaranty for the debt. But his acknowledgement after the execution of the Guaranty shall not prove anything on the person making the acknowledgement or the Guarantor.

Problem # 17. According to the stronger opinion, execution of a Guaranty for the owner of the real estates guaranteed through usurpation or possessed by an invalid contract for their return by their possessor is not valid.

Problem # 18. There is no objection in the execution of a Guaranty for the return of the price of a commodity by the seller to the buyer if it transpires that the title for object sold belonged to another, or that the contract for its sale has been declared void due to the non-fulfilment of one of the conditions required for its validity, while the seller has already received the price of the object and lost it. But if the price paid still subsists with the seller, there shall be hesitation in the validity of executing a Guaranty for it. According to the stronger opinion, execution of a Guaranty for the payment of compensation by the seller to the buyer is not valid if the buyer had erected a building or planted trees on the land purchased by him if it transpires that it belonged to some one else and the landlord has demolished the structure or uprooted the trees.

Problem # 19. If the debtor has deposited something as pawn against the debt owed by him, it shall be separated from the Guaranty, regardless whether the Guarantor has stipulated its separation or not.

Problem # 20. If a person owes a debt, and requests another to pay it off, and the latter pays it off without any Guaranty, the latter shall have the right of recourse for its payment by the beseeching person, if he did not intend to make the payment gratis.

كتاب الحوالة والكفالة

أما الحوالة فحقيقتها تحويل المديون ما في ذمته إلى ذمة غيره، و هي متقومة بأشخاص ثلاثه: المحيل و هو المديون، والمحتال و هو الدائن، و المحال عليه، و يعتبر فيهم البلوغ و العقل و الرشد و الاختيار، و في المحتال عدم الحجر للفلس، و كذا في المحيل إلا على البريء، وهي عقد يحتاج إلى إيجاب من المحيل و قبول من المحتال، و أما المحال عليه فليس طرفاً للعقد و إن قلنا باعتبار قبوله، و يكفي في الايجاب كل لفظ يدل على التحويل المزبور مثل أحلتك بما في ذمتي من الدين على فلان و ما يفيد معناه، و في القبول ما يدل على الرضا بذلك، و يعتبر في عقدها ما يعتبر في سائر العقود و منها التنجيز على الأحوط.

مسألة ١ - يشترط في صحة الحوالة مضافاً إلى ما تقدم أمور: منها- أن يكون المال المحال به ثابتاً في ذمة المحيل، فلا تصح في غيره و إن وجد سببه كمال الجعالة قبل العمل فضلاً عما لا يوجد كالحوالة بما سيستقرضه فيما بعد، و منها- تعيين المال المحال به بمعنى عدم الابهام و الترديد، و أما معلوميه مقداره أو جنسه عند المحيل أو المحتال فالظاهر عدم اعتبارها، فلو كان مجهولاً عندهما و معلوماً معيناً واقعاً لا بأس به خصوصاً مع فرض إمكان ارتفاع الجهالة. و منها- رضا المحال عليه و قبوله على الأحوط فيما إذا اشتغلت ذمته للمحيل بمثل ما أحال

SECTION TWENTY - FIVE

PROMISSORY NOTE (*ḤAVĀLAH*) AND PLEDGE (*KAFĀLAH*)

[Chapter one -Promissory Note (*Ḥavālah*)]

In fact, a Promissory Note is addressing another for the fulfilment of what is owed by a person. It requires the existence of three persons: firstly, the person issuing the Promissory Note or the Debtor, the person to whom the Promissory Note is given or the Creditor, and the person assigned for the payment of the Promissory Note. It is a condition that each of them should be an adult, sane, discreet, and have free will. It is also a condition for the Creditor that he must not be interdicted due to Insolvency. The same condition is also required in the person issuing the Promissory Note. If, however, the person assigned for the payment of the Promissory Note is free from debt, then it is not a condition for the person issuing the Promissory Note that he must also not be interdicted due to Insolvency. It is a contract that requires Declaration by the person issuing the Promissory Note, or the Debtor, and Acceptance by the person in whose favour it is issued. As regards the person to whom it is assigned, he is a not a party to the contract, even if we agree that Acceptance by him is also a condition [for this contract). It is sufficient to use any words denoting the sense of the said assignment, as, for instance: "I have assigned what was owed by me to such person," or what carries such sense. In an Acceptance, it is sufficient to use whatever conveys the sense of consent with it. All that is required in other contracts is also required in this contract, including, according to the more cautious opinion, that it must not be contingent on something else.

Problem # 1. Besides the conditions mentioned above, the following conditions are also required in a Promissory note:

First, that the property assigned must be proved as owed by the person issuing the Promissory Note, so that if his liability is not proved, the Promissory Note shall not be valid, even despite the existence of its cause, as the issuance of a Promissory Note against labour in a *Ju'ālah* contract, not to speak of a case where its cause also does not exist, as a Promissory Note issued against a debt to be obtained later.

Second, that the assignment must also be clearly described in a way there exists no confusion or doubt. Apparently, however, it is not a condition that the debtor or the creditor must have specific knowledge about its quantity and kind, so that it they are ignorant of both, but, in fact, it is specified, there shall be no objection in it, specially with the presumption that their ignorance shall be removed [in course of

عليه، و على الأقوى في الحوالة على البريء أو بغير جنس ما على المحال عليه.

مسألة ٢ ـ لا يعتبر في صحة الحوالة اشتغال ذمة المحال عليه بالدين للمحيل، فتصح الحوالة على البريء على الأقوى.

مسألة ٣ ـ لا فرق في المحال به بين كونه عيناً ثابتاً في ذمة المحيل و بين كونه منفعة أو عملاً لا يعتبر فيه المباشرة، فتصح إحالة مشغول الذمة بخياطة ثوب أو زيارة أو صلاة أو حج أو قراءة قرآن و نحو ذلك على بريء أو على من اشتغلت ذمته له بمثل ذلك، و كذا لا فرق بين كونه مثلياً كالحنطة والشعير أو قيمياً كالغنم و الثوب بعد ما كان موصوفاً بما يرفع الجهالة فاذا اشتغلت ذمته بشاة موصوفة مثلاً بسبب كالسلم جاز له إحالتها على من كان له عليه شاة بذلك الوصف أو كان بريئاً.

مسألة ٤ ـ لا إشكال في صحة الحوالة مع اتحاد الدين المحال به مع الدين الذي على المحال عليه جنساً و نوعاً، و أما مع الاختلاف بأن كان عليه لرجل مثلاً دراهم و له على آخر دنانير فيحيل الأول على الثاني فهو على أنحاء: فتارة يحيل الأول بدراهمه على الثاني بالدنانير بأن يأخذ منه و يستحق عليه بدل الدراهم الدنانير. و أخرى يحيله عليه بالدراهم بأن يأخذ منه الدراهم و يعطي المحال عليه بدل ما عليه من الدنانير الدراهم. و ثالثة يحيله عليه بالدراهم بأن يأخذ منه دراهمه و تبقى الدنانير على حالها. لا إشكال في صحة النحو الأول، و كذا الثالث، و يكون هو كالحوالة على البريء، و أما الثاني ففيه إشكال، فالأحوط فيما إذا أراد ذلك أن يقلب الدنانير التي على المحال عليه بدراهم بناقل شرعي أولاً ثم يحال عليه الدراهم، و إن كان الأقوى صحته مع التراضي.

مسألة ٥ ـ إذا تحققت الحوالة جامعة للشروط برأت ذمة المحيل عن الدين و إن لم يبرأه المحتال و اشتغلت ذمة المحال عليه للمحتال بما أحيل عليه، هذا حال المحيل مع المحتال و المحتال مع المحال عليه، و أما حال المحال عليه مع المحيل فان كانت الحوالة بمثل ما عليه برأت ذمته مما له عليه، و كذا إن كانت بغير الجنس

time].
Third, according to the more cautious opinion, the consent and Acceptance of the Assignee are also required in case it involves the existence of his liability to the debtor for what he has been assigned. According to the stronger opinion, if it is assigned to a person who is under no debt or it involves a kind different from what is owed by the Assignee, [the consent and Acceptance of the Assignee shall be required].

Problem # 2. It is not a condition for the validity of an assignment that the Assignee must be under a liability to the Assignor. According to the stronger opinion, it may be assigned to a person who is under no such liability.

Problem # 3. There is no difference in the assignment whether it is an established real estate owed by the Assignee, or it is a usufruct or performance of a job not to be performed personally. So for a person required to perform stitching a garment or perform a pilgrimage, prayer, Ḥajj, recitation of the Qur'ān, or the like, to assign it to a person who under no liability to do it, or to one who is liable to perform such job. Likewise, there is also no difference in the assigned object being something having equal in kind like wheat or barley, or in price like sheep or cloth described in a way that removes ignorance. If a person owes a goat of a specific description by way of a *Salam* transaction, it is permissible for him to assign its delivery by a person who owes to him the delivery of goat of that description or one who is under no such liability to him.

Problem # 4. There is no objection in the validity of an assignment if the Assignor and Assignee owe something of the same kind or variety. But in case of there being difference in its kind and variety, so that if a person owes some Dirhams to one and another owes some Dīnārs to him, and he issues Promissory Note to the former payable by the latter, it may be in different ways. He may issue a Promissory Note in Dīnārs to the person to whom he owes Dirhams payable by the latter, so that the former may be entitled to receive Dīnārs from the latter in exchange for Dirhams, or he may issue him a Promissory Note in Dirhams so that he may receive Dirhams from him, and the person to whom it is assigned may pay him Dirhams in exchange for the Dīnārs owed by him, or, thirdly, he may issue a Promissory Note in Dirhams so that the former may receive his Dirhams from the latter, and the Dīnārs may remain as they are. There is no objection in the first or the third alternative, as they are like issuing a Promissory Note payable by a person who is under no liability to him. But as regards the second, there is objection in it. To be more cautious, in case he intends to do it, he must first exchange the Dinars owed by the Assignee through an authorised exchange agent, and then issue a Promissory Note in Dirhams, though, according to the stronger opinion, it would be valid to act with mutual agreement.

Problem # 5. If the transaction fulfilling all the conditions is executed, the debtor is absolved of his liability for the debt, even if the person receiving it may not absolve him, as the person assigned the payment becomes responsible for it to the person who is entitled to receive it. This is the case of the Assignor with the person receiving it and that of the person receiving it with the Assignee. But as regards the case of the Assignee with the Assignor, if the assignment is equal to what he owes, he shall thereby be absolved of his liability. The same shall be the case even if it is payable in a different kind,

و وقعت على النحو الأول و الثاني مع التراضي، و أما إن وقعت على النحو الأخير أو كانت الحوالة على البريء اشتغلت ذمة المحيل للمحال عليه بما أحال عليه، و إن كان له عليه دين يبقى على حاله.

مسألة ٦ ـ لا يجب على المحتال قبول الحوالة و إن كانت على غني غير مماطل، ولو قبلها لزم و إن كانت على فقير معدم مع علمه بحاله، ولو كان جاهلاً فبان إعساره و فقره وقت الحوالة فله الفسخ و العود على المحيل، ولا فسخ مع الفقر الطاريء، كما لا يزول الخيار باليسار الطاري.

مسألة ٧ ـ الحوالة لازمة بالنسبة الى كل من الثلاثة إلا على المحتال مع إعسار المحال عليه و جهله بالحال كما أشرنا إليه، و المراد بالإعسار أن لا يكون عنده ما يوفي به الدين زائداً على مستثنياته، و يجوز اشتراط خيار الفسخ لكل منهم.

مسألة ٨ ـ يجوز الترامي في الحوالة بتعدد المحال عليه و اتحاد المحتال كما لو أحال المديون زيداً على عمرو ثم أحاله عمرو على بكر و هو على خالد و هكذا، أو بتعدد المحتال مع اتحاد المحال عليه كما لو أحال المحتال من له عليه دين على المحال عليه ثم أحال هو من عليه دين على ذلك المحال عليه و هكذا.

مسألة ٩ ـ لو قضى المحيل الدين بعد الحوالة برأت ذمة المحال عليه فان كان ذلك بمسألته رجع المحيل عليه، و إن تبرع لم يرجع.

مسألة ١٠ ـ لو أحال على بريء و قبل المحال عليه هل له الرجوع على المحيل بمجرده أو ليس له إلا بعد أداء الدين للمحتال؟ الأقرب الثاني.

مسألة ١١ ـ لو أحال البائع من له عليه دين على المشتري أو أحال المشتري البائع بالثمن على شخص آخر ثم تبين بطلان البيع بطلت الحوالة بخلاف ما إذا انفسخ البيع بخيار أو بالاقالة، فانه تبقى الحوالة و لم تتبع البيع فيه.

مسألة ١٢ ـ إذا كان له عند وكيله أو أمينه مال معين خارجي فأحال دائنه عليه ليدفع إليه و قبل المحتال وجب عليه دفعه إليه، ولو لم يدفع فله الرجوع على المحيل لبقاء شغل ذمته.

and it has taken place in the first or second manner with mutual agreement. But if it has taken place in the last manner, or it has been assigned to a person under no liability to the Assignor, the Assignor shall be held responsible to the Assignee for what he assigns to him, and if the Assignee owes a debt to the Assignor, it shall remain as it is.

Problem # 6. The Recipient [in whose favour the Promissory Note is issued] is not obliged to accept it, even if it is payable by a person who is wealthy and a prompt payer. But once he accepts it, it becomes binding on him, even if it is payable by an indigent person unable to pay it and whose condition is known to him. In case, however, he was ignorant, and his indigence comes to light at the time of the issuance of the Promissory Note, he shall have the option to rescind [or reject] it, and return it to the person issuing it. He shall have no such right in case the indigence takes place subsequent to its issuance, in the same way as he is not deprived of his right of option if the Assignee subsequently attains pecuniary affluence.

Problem # 7. A Ḥavālah is binding on all the three parties to it, except the person receiving it in case of penury of the person to whom its payment is assigned and in case of the former's ignorance about it, as already pointed out. By penury is meant the lack of possession of means by a person enough to pay the debt besides the exceptions of debt. An stipulation for option of cancellation by any of the three parties is legally allowed.

Problem # 8. *Tarāmī* [or underwriting] is allowed in a *Ḥavālah* in case there are several Assignees but a single Recipient, as when a debtor sends Zayd to 'Amr with a *Ḥavālah*, 'Amr then sends him to Bakr, and Bakr to Khalid, and so on. Or there may be several Recipients but a single Assignee [or the person who is assigned to pay the *Ḥavālah*], as when a Recipient sends his creditor to the person who is required to pay the *Ḥavālah*, then he sends him to his debtor, and so on.

Problem # 9. If the person issuing the *Ḥavālah* pays off his debt, the person who is required to pay the *Ḥavālah* shall thereby be absolved of his liability. If the payment has taken place on the request of the latter, the former shall have the right of recourse against the latter. If, however, the former has done it voluntarily, he shall have no such right [against the latter].

Problem # 10. If a person assigns the payment of a *Ḥavālah* to a person who owes nothing to him, shall the latter have the right of recourse against the former immediately or after the payment of the debt to the person in whose favour the former issued the *Ḥavālah*, is a question on which the stronger opinion is in favour of the latter case.

Problem # 11. If a seller issues a *Ḥavālah* to his debtor against the buyer, or the buyer issues a *Ḥavālah* for the price of the object of sale to the seller against another, and then the sale is declared void, the *Ḥavālah* shall also be declared void, contrary to the case when the cancellation takes place by an option or '*Iqālah*, in which case the *Ḥavālah* shall remain intact and shall not follow the fate of the sale.

Problem # 12. If a person has a specific property outside with his agent or trustee, and he sends his creditor to him along with a *Ḥavālah* to pay it to him, and the person receiving the *Ḥavālah* accepts, it shall be obligatory pay it to him. In case it is not paid to him, he shall have the right of recourse against

القول في الكفالة

وهي التعهد و الالتزام لشخص باحضار نفس له عليها حق، وهي عقد واقع بين الكفيل و المكفول له، و هوصاحب الحق، والايجاب من الأول: و يكفي فيه كل لفظ دال على المقصود نحو كفلت لك نفس فلان أو أنا كفيل لك باحضاره و نحو ذلك، و القبول من الثاني بما دل على الرضا بذلك.

مسألة ١ - يعتبر في الكفيل البلوغ و العقل و الاختيار و التمكن من الاحضار، و لا يشترط في المكفول له البلوغ و العقل، فيصح الكفالة للصبي و المجنون إذا قبلها الولي.

مسألة ٢ - لا إشكال في اعتبار رضا الكفيل و المكفول له، و الأقوى عدم اعتبار رضا المكفول، و عدم كونه طرفاً للعقد، نعم مع رضاه يلحق بها بعض الاحكام زائداً على المجردة منه، و الأحوط اعتبار رضاه و أن يكون طرفاً للعقد بأن يكون عقدها مركباً من ايجاب و قبولين من المكفول له و المكفول.

مسألة ٣ - كل من عليه حق مالي صحت الكفالة ببدنه، و لا يشترط العلم بمبلغ ذلك المال، نعم يشترط أن يكون المال ثابتاً في الذمة بحيث يصح ضمانه، فلو تكفل باحضار من لا مال عليه و إن وجد سببه كمن جعل الجعالة قبل أن يعمل العامل لم تصح، و كذا تصح كفالة كل من يستحق عليه الحضور إلى مجلس الشرع بأن تكون عليه دعوى مسموعة و إن لم تقم البينة عليه بالحق، و كذا تصح كفالة من عليه عقوبة من حقوق الخلق كعقوبة القصاص دون من عليه عقوبة من حقوق الله تعالى كالحد و التعزير فانها لا تصح.

مسألة ٤ - يصح إيقاع الكفالة حالة لو كان الحق ثابتاً على المكفول كذلك و مؤجلة، و مع الاطلاق تكون حالة مع ثبوت الحق كذلك، ولو كانت مؤجلة تلزم

the person issuing the *Ḥavālah* due to the continuation of his liability.

Chapter Two - Pledge (*Kafâlah*)

Kafâlah or Pledge is the undertaking by a person to a person having a right to present a person under an obligation to the latter. It is an agreement between the Pledger and the Pledgee, the person having the right. The Declaration is by the former. It is sufficient to couch it in whatever words denoting the purpose, like: "I have undertook to you for such person", or "I undertake to present such person," or the like. The Acceptance is by the latter in words indicating his consent with it.

Problem # 1. It is a condition in the Pledger that he must be an adult, sane, and having free will and the capacity to present [the person whom he undertakes to present], but it is not a condition in the Pledgee to be an adult and sane, and a pledge made to a minor or lunatic is valid provided it is assented to by his guardian,

Problem # 2. There is no objection in the condition of consent of the Pledger and Pledgee, though according to the stronger opinion, there is no condition of consent of the Pledgee, and he is not a party to the contract. Of course, some extra advantages ensue with his consent, which do not exist in its absence. According to the more cautious opinion, there must be a condition of his consent, and that he must be a party to the contract, so that the contract may consist of the Declaration [by the Pledger] and Acceptance by both the Pledgee and the person for whom the pledge is made.

Problem # 3. A physical pledge is valid for a person who is under a financial obligation, and the knowledge about its amount is not a condition. Of course, it is a condition that it must be an established one and owed by another in a way that it may be guaranteed. So if an undertaking is made to present a person owing no property, it shall not be valid, even if there is its cause, as when a person enters into a *Ju'ālah* , before the performance of the job by the agent, which is not be valid.

Likewise, an undertaking given for a person who is required to be presented before a court of law in connection with a case against him, even if a true evidence has not been adduced against him. Similarly an undertaking may be given for a person who is liable to be punished for some public offence, as punishment of *Qiṣâṣ*, excluding a person who is liable for punishment for offence committed against Allah the Exalted, as *Ḥadd* or *Ta'zīr*, which is not valid.

Problem # 4. It is valid to make a prompt undertaking if the obligation established against the person for whom undertaking is given is prompt. Likewise, [it is valid to give a] deferred one. In case it is left unspecified, it shall be treated as prompt provided the obligation is proved to be so. If it were a deferred one, it is necessary that the period of maturity be specified in a way that there may be no difference as

تعيين الأجل بنحو لا يختلف زيادة و نقصاً.

مسألة ٥ ـ عقد الكفالة لازم لا يجوز فسخه إلا بالاقالة، و يجوز جعل الخيار فيه لكل من الكفيل و المكفول له مدة معينة.

مسألة ٦ ـ إذا تحققت الكفالة جامعة للشرائط جاز مطالبة المكفول له الكفيل بالمكفول عاجلاً إذا كانت الكفالة مطلقة على ما مرّ أو معجلة و بعد الأجل إذا كان مؤجلة، فان كان المكفول حاضراً وجب على الكفيل تسليمه إلى المكفول له، فان سلّمه له بحيث يتمكن منه فقد برأ مما عليه، و إن امتنع عن ذلك يرفع الأمر إلى الحاكم، فيحبسه حتى يحضره أو يؤدي ما عليه في مثل الدين، و أما في مثل حق القصاص و الكفالة عن الزوجة فيلزم بالاحضار، و يحبس حتى يحضره و يسلّمه، و إن كان غائباً فان علم موضعه و يمكن للكفيل إحضاره أمهل بقدر ذهابه و مجيئه، فاذا مضى و لم يأت به من غير عذر حبس كما مر، و إن كان غائباً غيبة منقطعة لا يعرف موضعه و انقطع خبره فمع رجاء الظفر به مع الفحص لا يبعد أن يكلف باحضاره و حبسه لذلك خصوصاً إذا كان ذلك بتفريط منه، و أما إلزامه بأداء الدين في هذه الصورة فحل تأمل، نعم لو أدى تخلصاً من الحبس يطلق، و مع عدم الرجاء لم يكلف باحضاره، و الأقرب إلزامه بأداء الدين خصوصاً إذا كان ذلك بتفريط منه، بأن طالبه المكفول له و كان متمكناً منه و لم يحضره حتى هرب، نعم لو كان عدم الرجاء للظفر به بحسب العادة حال عقد الكفالة يشكل صحتها، و أما لو عرض ذلك فالظاهر عدم عروض البطلان خصوصاً إذا كان بتفريط من الكفيل، فلا يبعد حينئذ إلزامه بالأداء أو حبسه حتى يتخلص به خصوصاً في هذه الصورة.

مسألة ٧ ـ لو لم يحضر الكفيل المكفول فأخذ منه المال فان لم يأذن له المكفول لا في الكفالة و لا في الأداء ليس له الرجوع عليه بما أداه، و إن أذن له في الأداء كان له الرجوع سواء أذن له في الكفالة أيضاً أم لا و إن أذن له في الكفالة دون الأداء فهل يرجع عليه أم لا؟ لا يبعد أن يفصل بين ما إذا أمكن له إرجاعه و

to its being more or less.

Problem # 5. A contract of *Kafālah* is binding, and it cannot be revoked except by the mutual consent [of the parties]. It is permissible to stipulate an option for its revocation by either the Pledger or the Pledgee within a specified period.

Problem # 6. If a *Kafālah* has been entered into fulfilling all the required conditions, the Pledgee shall be entitled to ask the Pledger to present the person [whose presence is pledged] promptly if its nature has been left unmentioned, as already mentioned, or in case it were a prompt one, or when it were a deferred one and its time of maturity has already passed. If the person pledged to be presented is there, the Pledger shall be bound to present him to the Pledgee. If the Pledger presents him to the Pledgee in a way that the latter brings him under his control, the Pledger shall be absolved of his obligation. If the Pledger declines to present him, the case shall be filed in a court of law, and the judge shall imprison him until he presents the person pledged, or he pays off what is owed by the latter of the kind of loan. Even if the obligation is of the kind of *Qiṣāṣ* or the maintenance of the wife, it is necessary for the Pledger to present the person pledged, and to imprison the Pledger until he presents the person pledged and hands him over. If the person pledged is not there, and the Pledger knows his whereabouts, he shall be granted sufficient time to go and bring him. If the time expires and he fails to bring him without any due excuse, he shall be imprisoned, as already mentioned. If the person pledged is away for an indefinite period and his whereabouts are also not known, the knowledge about him is also over, then if there is some hope of success in search for him, it is not far from making him duty bound to present him, and he shall be imprisoned specially when it was all due to his fault. As regards the question of compelling the Pledger to pay the debt in such circumstances, there is hesitation [in its permission]. If he pays off the debt in order to be released, he shall be set free. If there is no hope [of finding him], he shall not be made duty bound to present him. According to the opinion closer to the traditional authority, the Pledger shall be compelled to pay off the debt specially if it was all due to his fault, as when the Pledgee asked him to present the person pledged, and the Pledger was able to do so, but he did not present him until he escaped. Of course, if there were no hope of success [in finding him out] in a contract of *Kafālah* according to the prevalent custom, there shall be hesitation in the validity of the contract [itself]. If the loss of hope has taken place subsequently, then apparently the contract shall not be void, especially when it was due to the fault of the Pledger. In such circumstances, it is not far from being likely to compel him to pay off the debt, or to imprison him until he releases himself from it, particularly in such case.

Problem # 7. If the Pledger has failed to present the person pledged, and so he has to surrender some property [for paying off the debt]. Then if the person pledged has not given his consent both for the *Kafālah* and payment [of the debt], the Pledger shall have right of recourse against the person pledged for what he has paid. If, however, he has given him permission for the payment, the Pledger shall have the right of recourse against him, regardless whether he has been given permission for the *Kafālah* or not. If, however, the person pledged has assented to the *Kafālah* but not to the payment, then whether the Pledger shall have the right of recourse against him or not, is a question in which it is not far from

إحضاره فالثاني و ما إذا تعذر فالأول.

مسألة ٨ ـ لو عين الكفيل في الكفالة مكان التسليم تعين، فلا يجب عليه تسليمه في غيره ولو طلب ذلك المكفول له، كما أنه لو سلمه في غيره لم يجب على المكفول له تسلمه، ولو أطلق و لم يعين مكانه فان أوقعا العقد في بلد المكفول له أو بلد قراره انصرف اليه، و إن أوقعاه في برية أو بلد غربة لم يكن من قصده القرار و الاستقرار فيه فان كانت قرينة على التعيين فهو، وإلا بطلت الكفالة من أصلها و إن كان في إطلاقه إشكال.

مسألة ٩ ـ يجب على الكفيل التوسل بكل وسيلة مشروعة لاحضار المكفول حتى أنه لو احتاج إلى الاستعانة بشخص قاهر لم تكن فيها مفسدة أو مضرة دينية أو دنيوية لم يبعد وجوبها، ولو كان غائباً و احتاج حمله إلى مؤونة فان كانت الكفالة باذن المكفول فهي عليه، ولو صرفها الكفيل لا بعنوان التبرع فله أن يرجع بها عليه على إشكال في بعضها و ان لم تكن باذنه فعلى الكفيل.

مسألة ١٠ ـ تبرأ ذمة الكفيل باحضار المكفول أو حضوره و تسليمه نفسه تاماً عن قبل الكفيل، و أما حضوره و تسليم نفسه لا عن قبله فالظاهر عدم براءة ذمته، و كذا لو أخذه المكفول له طوعاً أو كرهاً بحيث تمكن من إستيفاء حقه أو إحضاره مجلس الحكم،نعم لو أبرىء المكفول عن الحق الذي عليه أو الكفيل من الكفالة تبرأ ذمته.

مسألة ١١ ـ لو نقل المكفول له الحق الذي له على المكفول إلى غيره ببيع أو صلح أو حوالة بطلت الكفالة.

مسألة ١٢ ـ لو مات الكفيل أو المكفول بطلت الكفالة، بخلاف ما لو مات المكفول له، فان حقه منها ينتقل إلى ورثته.

مسألة ١٣ ـ من خلى غريماً من يد صاحبه قهراً و إجباراً ضمن إحضاره، ولو أدى ماعليه سقط ضمانه، هذا في مثل الدين، و أما في مثل حق القصاص فيضمن إحضاره، و مع تعذره فمحل إشكال، ولو خلى قاتلاً من يد ولي الدم

distinguishing between the case when it was possible for him to have recourse to the person pledged and present him, in which case he would not have the right of recourse against him, and when it was not possible, in which case he shall have such right.

Problem # 8. If the Pledger has specified the place where the person is to be handed over, it shall be binding, and he shall not be bound to hand him over at any other place even if it is demanded by the Pledgee, in the same way as when the Pledger hands him over in some other place, the Pledgee shall not be bound to accept. If the place is left unmentioned in the pledge, then if the pledge were executed in the place of the Pledgee or at the place of its execution, it shall revert to that place. If it were executed in wilderness or an alien town where the parties did not intend to stay and there are indications showing that it was to be determined some where else, then they shall follow it; otherwise, the pledge shall be declared void ab initio, even if there is hesitation in treating as one in which the place is left unmentioned.

Problem # 9. The Pledger is bound to adopt all possible lawful means to arrange to present the pledged person, even if he needs the help of a powerful person provided there is no cause of corruption or evil or any worldly or religious harm in it. If the person pledged is away and bringing him involves some expenditure, then if the pledge has been executed with the consent of the person pledged, he shall be liable to bear the expenditure. If the Pledger has already borne the expenditure without intending to do it gratis, then he shall have the right of recourse against the person pledged, though there is some hesitation in respect of some of the expenditures. If the pledge were not executed with the consent of the pledged person, then the Pledger shall bear the expenditure himself.

Problem # 10. The Pledger is absolved of his liability after presenting the person pledged, or when the latter presents or surrenders himself totally, but the liability does not cease in case the pledged person presents or surrenders himself. The same shall be the case if the Pledgee gets hold of the pledged person willy-nilly in whatever way it was possible for the fulfilment of his right or by producing him in the court of law. If the pledged person is absolved of his liability or the Pledger is excused of his pledge, he shall be absolved of his liability.

Problem # 11. If the Pledgee transfers his right on the person pledged to another through a sale, conveyance or *Ḥavālah*, the pledge shall thereby stand cancelled.

Problem # 12. If the Pledger or the person pledged dies, the pledge shall stand cancelled, contrary to the case when the Pledgee dies, his right shall be transferred to his heirs.

Problem # 13. If a person arranges the escape of debtor from the possession of the creditor by force or compulsion, he shall be responsible to present him. If the debtor pays of his debt, the liability shall drop. This relates to cases like a debt, but in cases like the right of *Qiṣās*, the person is bound to present the escapee, and in case of his inability to do so, there is difficulty [in deciding about his liability]. If a person arranges the escape of a murderer from the possession of the avenger of blood (*Waliyy al-dam*), he shall be responsible to present the escapee. If it is not possible due to the death of the escapee or the like, he shall be liable to pay *Diyat*. This relates to the case of a premeditated murder [or a culpable homicide amounting to murder]. But in case where he is liable to pay the *Diyat*, it is not far from

ضمن إحضاره، و مع تعذره بموت و نحوه تؤخذ منه الدية، هذا في القتل العمدي، و أما ما يوجب الدية فلا يبعد جريان حكم الدين عليه من ضمان إحضاره، ولو أدى ما عليه سقط ضمانه.

مسألة ١٤ - يجوز ترامي الكفالات بأن يكفل الكفيل آخر و يكفل هذا آخر و هكذا، وحيث أن الكل فروع الكفالة الأولى و كل لا حق فرع سابقه فلو أبرأ المستحق الكفيل الأول أو أحضر الأول المكفول الأول أو مات أحدهما برأوا أجمع، ولو أبرأ المستحق بعض من توسط برأ هو و من بعده دون من قبله، و كذا لو مات برأ من كان فرعاً له.

مسألة ١٥ - يكره التعرض للكفالات، فعن الصادق عليه السلام «الكفالة خسارة غرامة ندامة».

likelihood that the rule of debt should apply to him, so that he would be liable to present the escapee. If he pays what is owed by the escapee, he shall be absolved of his liability.

Problem # 14. *Tarāmī* (Underwriting) of pledges is allowed, so that a person may be a Pledger for another, and that one for another, and so on, and thus all the pledges are the subsidiaries of the first pledge, and each subsequent pledge is the subsidiary of the preceding one. So if the creditor releases the first Pledger from his liability, or the first Pledger presents the first pledged person. Or either of them dies, all of them shall be released from their liability. If the creditor releases any one of the Pledgers from the middle, that one and those following him shall be released from their liability but not those preceding him. Similarly, if a Pledger dies, the one being a subsidiary to him shall also be released from his liability.

Problem # 15. It is disapproved to be a Pledger for another. So it has been reported from (Imām Ja'far) al-Ṣādiq, A.S., [that he has said:] "A *Kafālah* or Pledge is (a cause of) loss, fine and repentance."

كتاب الوكالة

وهي تفويض أمر إلى الغير ليعمل له حال حياته، أو إرجاع تمشية أمر من الأمور إليه له حالها، وهي عقد يحتاج إلى إيجاب بكل ما دل على هذا المقصود، كقوله وكلتك أو أنت وكيلي في كذا أو فوضته اليك و نحوها، بل الظاهر كفاية قوله: بع داري قاصداً به التفويض المذكور فيه، و قبول بكل ما دل على الرضا به، بل الظاهر أنه يكفي فيه فعل ما و كل فيه بعد الايجاب، بل الأقوى وقوعها بالمعاطاة بأن سلّم إليه متاعاً ليبيعه فتسلّمه لذلك، بل لا يبعد تحققها بالكتابة من طرف الموكل و الرضا بما فيها من طرف الوكيل و إن تأخر وصولها إليه مدة، فلا يعتبر فيها الموالاة بين ايجابها وقبولها، و بالجملة يتسع الأمر فيها بما لا يتسع في غيرها، حتى أنه لو قال الوكيل: «أنا و كيلك في بيع دارك» مستفهماً فقال: «نعم» صح و تم و إن لم نكتف بمثله في سائر العقود.

مسألة ١ - يشترط فيها على الأحوط التنجيز بمعنى عدم تعليق أصل الوكالة على شيء كقوله مثلاً إذا قدم زيد أو أهل هلال الشهر و كلتك في كذا، نعم لا بأس بتعليق متعلقها كقوله أنت وكيلي في أن تبيع داري إذا قدم زيد أو وكلتك في شراء كذا في وقت كذا.

مسألة ٢ - يشترط في كل من الموكل و الوكيل البلوغ و العقل والقصد و

SECTION TWENTY – SIX

AGENCY (*WAKĀLAH*)

Agency or *Wakālah* is entrusting another the performance of some thing during his lifetime, or assigning the arrangement of some job on his behalf during his lifetime. It is a contract requiring a Declaration [by the Principal] in whatever words denoting such purpose, as saying: "I have assigned to you or you are my agent in such job, or I have entrusted to you [the performance of such job]", or the like. Apparently it is sufficient to say: "Sell my house ', intending thereby to entrust the said duty. [It also requires] an Acceptance [made by the Agent] in whatever words denoting his consent with it. Rather, it is sufficient for the Agent after the Declaration to perform whatever job is assigned to him.

According to the stronger opinion, it can be executed through *Mu'āṭāt*, so that a person delivers some commodity to another for sale , and he accepts it for that purpose. Rather it can also take place by writing from the Principal's side, and consent with it from the Agent's side, even if the writing reaches the Agent after the passage of some time. This shows that there is no condition of prompt sequence (*Muwālat*) between Declaration and Acceptance in it.

In short, the vagueness allowed in it is more than allowed in other contracts, to the extent that if the Agent says to the Principal: "Am I your Agent in selling your house?" and the Principal replies in the affirmative, it shall be a valid contract, and that is all, although such form is not sufficient in other contracts.

Problem # 1. According to the more cautious opinion, it is a condition in it that it must be free from all conditions, in the sense that the actual Agency must not be contingent on any thing, as when he says: "When Zayd comes, or the moon for such month appears, I shall appoint you as my Agent for such job".

Of course, there is no objection in making it contingent on something connected with it, as when a person says: "You are my agent in selling my house when Zayd comes," or "I have appointed you as my agent in buying such thing at such time."

Problem # 2. It is a condition that both the Principal and the Agent must be adult, sane, and have

الاختيار، فلا يصح التوكيل و لا التوكل من الصبي و المجنون و المكره، نعم لا يشترط البلوغ في الوكيل في مجرد إجراء العقد على الأقرب، فيصح توكيله فيه إذا كان مميزاً مراعياً للشرائط، و يشترط في الموكل كونه جائز التصرف فيما و كل فيه، فلا يصح توكيل المحجور عليه لسفه أو فلس فيما حجر عليهما فيه دون غيره كالطلاق، و أن يكون إيقاعه جائزاً له ولو بالتسبيب، فلا يصح منه التوكيل في عقد النكاح أو ابتياع الصيد إن كان محرماً، و في الوكيل كونه متمكناً عقلاً و شرعاً من مباشرة ما توكل فيه، فلا تصح وكالة المحرم فيما لا يجوز له كابتياع الصيد وإمساكه و إيقاع عقد النكاح.

مسألة ٣ ـ لا يشترط في الوكيل الاسلام، فتصح وكالة الكافر ـ بل والمرتد و إن كان عن فطرة ـ عن المسلم و الكافر إلا فيما لا يصح وقوعه من الكافر كابتياع المصحف لكافر و كاستيفاء حق من المسلم أو مخاصمة معه و إن كان ذلك لمسلم.

مسألة ٤ ـ تصح وكالة المحجور عليه لسفه أو فلس عن غيرهما ممن لا حجر عليه.

مسألة ٥ ـ لو جوزنا للصبي بعض التصرفات في ما له كالوصية بالمعروف لمن بلغ عشر سنين جاز له التوكيل فيما جاز له.

مسألة ٦ ـ ما كان شرطاً في الموكل و الوكيل ابتداءً شرط فيهما استدامة، فلو جنّا أو أغمي عليهما أو حجر على الموكل فيما و كل فيه بطلت الوكالة على الأحوط، ولو زال المانع احتاج عودها إلى توكيل جديد.

مسألة ٧ ـ يشترط فيما و كل فيه أن يكون سائغاً في نفسه و أن يكون للموكل سلطنة شرعاً على إيقاعه، فلا توكيل في المعاصي كالغصب والسرقة و القمار و نحوها، و لا على بيع مال الغير من دون ولاية عليه، و لا تعتبر القدرة عليه خارجاً مع كونه مما يصح وقوعه منه شرعاً، فيجوز لمن لم يقدر على أخذ ما له من غاصب أن يوكل فيه من يقدر عليه.

intention and free will. So it is not valid for a minor, lunatic or one under duress to act as a Principal or an Agent. According to the opinion closer to the traditional authority, it is not a condition for the person pronouncing the prescribed words of the contract of Agency to be an adult. It is sufficient if he is discreet and fulfils all other conditions for it. It is a condition in the Principal that he must possess the authority to effect changes in the thing for which he is appointing an agent. It is, therefore, not valid for one who is interdicted due to Insolvency or Idiocy to appoint an Agent in what he is interdicted due to the two blemishes excluding other matters like Divorce, [in which he may appoint another as his Agent], and that it should be lawful for him to perform such act although it is done through another person. So it is not valid for a person to appoint another as his Agent in the conclusion of a marriage or selling a prey while he had not yet untied his *Iḥrām*. It is also a condition in an Agent that he must be competent mentally and religiously to perform personally what he is commissioned to do. So it is not lawful for a person who has not yet untied *Iḥrām* to sell or keep prey with him, or pronounce the prescribed words of marriage on behalf of another.

Problem # 3. It is not a condition for the Agent to be a Muslim, so that it is valid to appoint an infidel or an apostate, even if born of Muslim parents, as an Agent of a Muslim or an infidel, except in what an infidel is not allowed to perform, as buying the Qur'ān for an infidel, receiving the debt of a Muslim or bring settlement between him and another person even if were on behalf of a Muslim.

Problem # 4. Appointment as an Agent of a person interdicted due to Insolvency or Idiocy by another who is not interdicted due to either Insolvency or Idiocy is valid.

Problem # 5. If we have declared it permissible for a minor to make changes in his property as making a will for some good purpose by a child of ten years, he may be allowed to appoint another as his agent in matters in which he is allowed to make changes.

Problem # 6. What has been declared as conditions for a Principal or an Agent initially shall persist as conditions throughout.

If the Principal or the Agent become insane or loose consciousness, or the Principal is interdicted in what he has appointed an Agent, according to the more cautious opinion, the Agency shall be declared null and void. If the obstacle is removed, revival of the Agency shall require the conclusion of another contract of Agency.

Problem # 7. It is a condition that the job for which an Agent has been appointed must be lawful itself, and the Principal must possess a lawful authority for conclusion of its contract. So it is not valid to appoint an Agent for the performance of sinful acts, as usurpation, theft, gambling, or the like, or sale of a property belonging to another without being a guardian [to have an authority to do so]. It is not a condition for a person to have power to do something outwardly though it is valid to do so legally. So it is lawful for a person who is not powerful enough to get his property back from a usurper to appoint another as his Agent who is capable to do so.

مسألة ٨ ـ لو لم يتمكن شرعاً أو عقلاً من إيقاع أمر إلا بعد حصول أمر غير حاصل حين التوكيل كتطليق امرأة لم تكن في حبالته و تزويج من كانت مزوجة أو معتدة و نحو ذلك فلا إشكال في جواز التوكيل فيه تبعاً لما تمكن منه، بأن يوكله في ايقاع المرتب عليه ثم إيقاع ما رتب عليه، بأن يوكله مثلاً في تزويج امرأة له ثم طلاقها أو شراء مال ثم بيعه و نحو ذلك ، كما أن الظاهر جوازه لو وقعت الوكالة على كلي يكون هو من مصاديقه، كما لو وكله على جميع أموره فيكون وكيلاً في المتجدد في ملكه بهبة أو إرث بيعاً و رهناً و غيرهما، وأما التوكيل استقلالاً في خصوصه من دون التوكيل في المرتب عليه ففيه إشكال، بل الظاهر عدم الصحة من غير فرق بين ما كان المرتب عليه غير قابل للتوكيل كانقضاء العدة أو قابلاً، فلا يجوز أن يوكل في تزويج المعتدة بعد انقضاء عدتها و المزوجة بعد طلاقها، و كذا في طلاق زوجة سينكحها أو بيع متاع سيشتريه و نحو ذلك.

مسألة ٩ ـ يشترط في الموكل فيه أن يكون قابلاً للتفويض إلى الغير بأن لم يعتبر فيه المباشرة من الموكل، فلو تقبل عملاً بقيد المباشرة لا يصح التوكيل فيه، وأما العبادات البدنية كالصلاة و الصيام والحج و غيرها فلا يصح فيها التوكيل و إن فرض صحة النيابة فيها عن الحي كالحج عن العاجز أو عن الميت كالصلاة و غيرها، فان النيابة غير الوكالة اعتباراً، نعم تصح الوكالة في العبادات المالية كالزكاة و الخمس و الكفارات إخراجاً و إيصالاً إلى المستحق.

مسألة ١٠ ـ يصح التوكيل في جميع العقود كالبيع و الصلح و الاجارة و الهبة و العارية و الوديعة و المضاربة و المزارعة و المساقاة و القرض و الرهن و الشركة و الضمان والحوالة و الكفالة و الوكالة و النكاح إيجاباً و قبولاً في الجميع و كذا في الوصية والوقف و الطلاق و الابراء و الأخذ بالشفعة و إسقاطها وفسخ العقد في موارد ثبوت الخيار و إسقاطه، و الظاهر صحته في الرجوع إلى المطلقة الرجعية إذا أوقعه على وجه لم يكن صرف التوكيل تمسكاً بالزوجية حتى يرتفع به متعلق

Problem # 8. If a person is not capable in entering into a contract legally or rationally except after the occurrence of something not there at the time of appointing another as his agent like divorcing a woman who is not in his wedlock or marrying a woman who is already married, or is observing *'Iddah*, or the like, there is no objection in the permissibility of appointing another as his agent for what he is capable to do, and then appoint as his agent for something contingent on it. For example, he may appoint a person as his agent for bringing a woman in his wedlock and then for divorcing her, or first for buying something and then for selling it, or the like, as its permissibility is apparent in appointing someone in general for something which includes another thing as its corollary, as when a person appoints another as his agent in all matters, so in case of every property that falls into his ownership subsequently by way of a free gift or inheritance he shall be his agent for its sale, mortgage, etc. But in case of appointing another as his agent separately in particular for something that is not a corollary of a previous general agency, there is hesitation in its validity. Rather apparently it shall not be valid without there being difference whether the matter relating to the previous appointment as agent is something in which such appointment is not possible as the termination of *'Iddah* or not.

So it is not permissible to appoint another as his agent for bringing a woman in his wedlock who is at that time observing *'Iddah*, or for bringing a woman in his marriage who is at that time in someone's wedlock after she has been divorced by her husband. Similar is the case of appointing a person for divorcing a woman who is yet to be married by him, or for selling a property that he is going to purchase, or the like.

Problem # 9. It is a condition for the thing for which another is appointed as agent that it must be capable of being entrusted to another, so that personal performance should not be a condition for it. So if a person has accepted to be performed personally by him, it shall not be lawful for him to appoint another to perform it. So as regards the *'Ibādāt* required to be performed physically, as prayers (*Ṣalāt*), fasting, Ḥajj, etc., it is not valid to appoint another to perform them, even if we may accept their validity for a live person as Ḥajj on behalf of an incapable person or prayers, etc. on behalf of a deceased person, as performance of an act on behalf of another is different from acting as an agent. Of course, appointment of an agent is valid in case of financial *'Ibādāt* as Zakāt, Khums, or expiations (*Kaffārāt*) as far as their deduction and payment to the deserving persons is concerned.

Problem # 10. Appointment of an agent is valid in all contracts like sale, conveyance, lease, gift, *'Āriyah, Wadī'ah, Muḍārabah, Muzāra'ah* (Metayage), *Musāqāt*, Loan, Mortgage, Partnership, Guaranty, *Ḥavālah, Kafālah, Wakālah*, Marriage, as regards making Declaration or Acceptance in all these contracts. The same is the case with Wills, Endowments, divorce, Release from Liability, receiving something by way of pre-emption or dropping it, revocation of a contract in case of an established right of option or dropping it. Apparently, it is valid in case of recalling an irrevocably divorced woman in a way that the appointment as agent may not only cause bringing her into wedlock; otherwise, the subject of Agency shall be eliminated. It is not far from being valid in case of *Nadhr, 'Ahd*,

الوكالة، و لا يبعد صحته في النذر و العهد و الظهار، و لا يصح في اليمين و اللعان و الايلاء والشهادة و الاقرار على إشكال في الأخير.

مسألة ١١ ـ يصح التوكيل في القبض و الاقباض في موارد لزومهما كما في الرهن و القرض و الصرف بالنسبة الى العوضين، و السلم بالنسبة إلى الثمن، و في إيفاء الديون و استيفائها و غيرها.

مسألة ١٢ ـ يجوز التوكيل في الطلاق غائباً كان الزوج أم حاضراً، بل يجوز توكيل الزوجة في أن تطلق نفسها بنفسها أو بأن توكل الغير عن الزوج أو عن نفسها.

مسألة ١٣ ـ تجوز الوكالة في حيازة المباح كالاستقاء و الاحتطاب و غيرهما، فاذا وكل شخصاً فيها و قد حاز بعنوان الوكالة عنه صار ملكاً له.

مسألة ١٤ ـ يشترط في الموكل فيه التعيين بأن لا يكون مجهولاً أو مبهماً، فلو قال: «و كلتك على أمر من الأمور» لم يصح، نعم لا بأس بالتعميم و الاطلاق كما يأتي.

مسألة ١٥ ـ الوكالة إما خاصة و إما عامة و إما مطلقة، فالأولى ما تعلقت بتصرف معين في شيء معين، كما إذا و كله في شراء بيت معين، و هذا مما لا إشكال في صحته، و الثانية إما عامة من جهة التصرف و خاصة من جهة المتعلق، كما إذا و كله في جميع التصرفات الممكنة في داره المعينة و إما بالعكس كما إذا و كله في بيع جميع ما يملكه، و إما عامة من الجهتين كما إذا و كله في جميع التصرفات الممكنة في جميع ما يملكه أو في إيقاع جميع ما كان له فيما يتعلق به بجميع أنواعه بحيث يشمل التزويج له و طلاق زوجته و كذا الثالثة قد تكون مطلقة من جهة التصرف خاصة من جهة متعلقه، كما لو قال: «أنت وكيلي في أمر داري» و كذا لو قال: «أنت وكيلي في بيع داري» مقابل المقيد بثمن معين أو شخص معين، و قد يكون بالعكس كما لو قال: أنت وكيلي في بيع أحد أملاكي أو في بيع ملكي، و قد تكون مطلقة من الجهتين، كما لو قال: «أنت

and *Ẓihār*. But it is valid in case of an oath, *Li'ān*, *Īlā'*, Evidence and Acknowledgement, though there is hesitation in case of the latter.

Problem # 11. Appointment of an agent for taking or giving possession in necessary cases is valid, as in Mortgage, Loan, Disbursement in relation to two objects of exchange, and *Salam* in relation to the price of the object of sale and in payment of debts and their acceptance, etc.

Problem # 12. Appointment of an agent in divorce is valid, regardless whether the husband is present or absent. Rather, divorcing herself by a woman or appointment of an agent on behalf of the husband or herself for pronouncing the prescribed words of divorce is also valid.

Problem # 13. Appointment of an agent for possession of ownerless objects as provision of water or collection of fuel, etc. is valid. If a person appoints another and he takes the ownerless objects in possession, the principal shall thereby become their owner.

Problem # 14. It is a condition for the object for which a person is appointed an agent that it must be specified, so that it must not be unknown or ambiguous. So if a person says to another: "I have appointed you an agent for one of the matters," it shall not be valid. Of course, there is no objection in generalisation or leaving the object unconfined, as follows.

Problem # 15. An Agency is either special, or general, or unconfined. The first one relates to the special function in a particular object, as when a person appoints another an agent for purchasing a particular house. This is the type in which there is no objection in its validity. The second one is general as regards the function but special in relation to the object concerned, as when a person appoints another as an agent to make all possible changes in his specific house. Or it may be otherwise, as when he appoints him agent in sale of whatever is owned by him.

Or it may be general in both aspects, as when a person appoints another as his agent to make all possible changes in whatever is owned by him, or conclude any agreement in relation to whatever is owned by him in all kinds of manners concerning them, including giving him in marriage or divorcing his wife. Similarly, the third one may be unconfined as regards the function, but special as regards the objected concerned, as when a person says to another: "You are my agent in the matter of my house." The same is the case when he says to another: "You are my agent in the sale of my house," as opposed to confining it to a specific price and a specific person Or it may be otherwise, as when he says to another: "You are my agent in the sale of one of my properties, or in the sale of my property." It may be unconfined in both aspects, as when he says to another: "You are my agent in making changes in my property."

وكيلي في التصرف في مالي» و ربما يكون التوكيل بنحو التخيير بين أمور: إما في التصرف دون المتعلق، كما لو قال: «أنت وكيلي في بيع داري أو صلحها أو هبتها أو إجارتها» و إما في المتعلق فقط، كما لو قال: «أنت وكيلي في بيع هذه الدار أو هذه الدابة أو هذه الفرش» مثلاً، و الظاهر صحة الجميع.

مسألة ١٦ ـ لابد أن يقتصر الوكيل في التصرف في الموكل فيه على ما شمله عقد الوكالة صريحاً أو ظاهراً ولو بمعونة قرائن حالية أو مقالية ولو كانت هي العادة الجارية على أن التوكيل في أمر لازمه التوكيل في أمر آخر، كما لو سلم إليه المبيع و وكله في بيعه أو سلم إليه الثمن و وكله في الشراء. و بالجملة لابد في صحة التصرف من شمول الوكالة له.

مسألة ١٧ ـ لو خالف الوكيل و أتى بالعمل على نحو لم يشمله عقد الوكالة فان كان مما يجري فيه الفضولية كالعقود توقفت صحته على إجازة الموكل، و لا فرق في التخالف بين أن يكون بالمباينة كما إذا و كله في بيع داره فآجرها أو ببعض الخصوصيات كما إذا و كله في بيعها نقداً فباع نسيئة أو بخيار فباع بدونه، نعم لو علم شموله لفاقد الخصوصية أيضاً صح في الظاهر، كما إذا و كله في أن يبيع السلعة بدينار فباع بدينارين، فان الظاهر بل المعلوم من حال الموكل أن تحديده من طرف النقيصة لا الزيادة، و من هذا القبيل ما إذا و كله في البيع في سوق معين بثمن معين فباعها في غيره بذلك الثمن، فان الظاهر أن مراده تحصيل الثمن، هذا بحسب الظاهر، و أما الصحة الواقعية فتابعة للواقع، ولو فرض احتمال وجود غرض عقلائي في التحديد لم يجز التعدي، و معه فضولي في الظاهر و الواقع تابع للواقع.

مسألة ١٨ ـ يجوز للولي كالأب والجد للصغير أن يوكل غيره فيما يتعلق بالمولى عليه مما له الولاية عليه.

مسألة ١٩ ـ لا يجوز للوكيل أن يوكل غيره في إيقاع ما توكل فيه لا عن نفسه و لا عن الموكل إلا باذنه، و معه يجوز بكلا النحوين، فان عين أحدهما فهو

Sometimes the agency is made by way of selection in matters, either in the authority to make changes but not as regards the object concerned, as when he says to another: "You are my agent in the sale of my house, or in its conveyance, or its free gift or its lease." Or it may be with regard to the object concerned, as, for example, when he says to another: "You are my agent in the sale of this house, or this beast of burden, or this carpet." Apparently, all these forms of agencies are valid.

Problem # 16. It is indispensable for the agent to confine himself to make such changes in the object whose agency he has been entrusted as are incorporated in the contract of agency explicitly or apparently or with the help of the circumstantial or verbal context even if according to the prevalent tradition the context implies that the agency in one matter may necessary mean agency in another matter, as when a person hands over the object of sale to another and appoints him an agent in its sale, or hands over the price (of the object) and appoints him an agent in its purchase. In short, it is indispensable for the validity of the change made in the object that it must be incorporated in the contract of agency.

Problem # 17. If the agent commits contravention, and acts in a manner not incorporated in the contract of agency, then if it were of the nature of an unauthorized one like contracts its validity shall depend on its subsequent endorsement by the principal. There is no difference in the contravention whether it is variant, as when the person has authorized him to sell his house, but he rents it out, or the variation may be in some of the characteristics of the act, as when the person has authorized him to sell the object in cash, but the agent sells it on credit, or has authorized him to sell it with a condition of option, but he has sold it without it. Of course, if the agent knows that there is no particularization in the contract, it shall apparently be valid, as when a person appoints anther to sell a commodity for a Dīnār, but he sells it for two Dīnārs, then it is apparent, rather it is known that limitation imposed by the principal had been in respect of reducing the price but in increasing it. Similar is the case when a person a person authorized another to sell something in a specific market for a specific price, but he sells it in some other market for the same price, then it is apparent that the intention of the principal was to get that specific price. This is according to what is apparent, but the actual validity depends on the actual position. If it is supposed that there is a rational purpose behind the imposition of a limitation, then its contravention shall not be permissible, in which case it shall be treated as an unauthorized transaction, and the fact depends on the actual situation.

Problem # 18. A guardian of a minor like the father or grandfather is allowed to appoint in agent on behalf of their ward in matters in which they enjoy such authority.

Problem # 19. An agent is not allowed to authorize another in what he has been authorized to do neither on behalf of himself nor on behalf of the principal except with the permission of the principal. With the permission of the principal he may authorize in both ways. If the principal allows a specific one, he shall be bound to act accordingly, and he is not allowed to contravene it. So if person says to the

المتبع، و لا يجوز التعدي عنه، ولو قال مثلاً: «و كلتك في أن توكل غيرك» فهو إذن في توكيل الغير عن الموكل، و الظاهر أنه كذلك لو قال: «و كّل غيرك» و ان لا يخلو من تأمل.

مسألة ٢٠ ـ لو كان الوكيل الثاني وكيلاً عن الموكل كان في عرض الأول، فليس له أن يعزله و لا ينعزل بانعزاله، بل لو مات يبقى الثاني على و كالته، ولو كان وكيلاً عنه كان له عزله، و كانت وكالته تبعاً لوكالته، فينعزل بانعزاله أو موته، و لا يبعد أن يكون للموكل عزله من دون عزل الوكيل الأول.

مسألة ٢١ ـ يجوز أن يتوكل إثنان فصاعداً عن واحد في أمر واحد، فان صرح الموكل بانفرادهما أو كان لكلامه ظاهر متبع في ذلك جاز لكل منهما الاستقلال في التصرف من دون مراجعة الآخر، و الا لم يجز الانفراد لأحدهما ولو مع غيبة صاحبه أو عجزه، سواء صرح بالانضمام و الاجتماع أو أطلق بأن قال مثلاً وكلتكما أو انتما وكيلاي و نحو ذلك، ولو مات أحدهما بطلت الوكالة رأساً مع شرط الاجتماع أو الاطلاق المنزل منزلته و بقيت وكالة الباقي لو وكل بالانفراد.

مسألة ٢٢ ـ الوكالة عقد جائز من الطرفين، فللوكيل أن يعزل نفسه مع حضور الموكل و غيبته، و كذا للموكل أن يعزله، لكن انعزاله بعزله مشروط ببلوغه إياه، فلو أنشأ عزله و لم يطلع عليه الوكيل لم ينعزل فلو أمضى أمراً قبل أن يبلغه ولو باخبار ثقة كان نافذاً.

مسألة ٢٣ ـ تبطل الوكالة بموت الوكيل، و كذا بموت الموكل و إن لم يعلم الوكيل بموته، و بعروض الجنون على كل منهما على الأقوى في الاطباقي، و على الأحوط في غيره، و باغماء كل منهما على الأحوط، و بتلف ما تعلقت به الوكالة، و بفعل الموكل ـ ولو بالتسبيب ـ ما تعلقت به، كما لو وكله في بيع سلعة ثم باعها، أو فعل ماينافيه كما و كله في بيع شيء ثم أوقفه.

مسألة ٢٤ ـ يجوز التوكيل في الخصومة والمرافعة لكل من المدعي و المدعى

agent: "I have authorized you to authorize another (to do so and so)", it shall be treated as permission of the principal to appoint another as his agent. Apparently it shall be the same if he says: "Appoint another as your agent", then it shall not be free from hesitation.

Problem # 20. If the second agent is appointed as an agent on behalf of the principal, he shall be at par with the first agent, and the first agent shall not be allowed to dismiss him, nor shall he be dismissed by his dismissal. So if the first agent dies, the second agent shall continue to be an agent. If the second agent is appointed as agent by the first agent, the latter shall be authorized to dismiss the former, and the formers agency shall be subservient to the latter's agency, and it shall be terminated by the dismissal or death of the first agent. It is not far from likelihood for the principal to have the authority to dismiss the second agent without dismissing the first.

Problem # 21. A person may appoint two or more persons as his agent for a single object. If the principal has explicitly clarified that they shall act independent of each other, or it is apparent from his statement, each of them shall be allowed to deal with the object independently without referring to another. Otherwise, it shall not be allowed for any of them to act independently, even in the absence of the other or his incapability, regardless whether he has clarified for their merger or joint action or has left it unmentioned, as, for example, when he says: " I have authorized you both, or both of you are my agents," or the like. If one of them dies, the agency shall be terminated ab initio, provided that there is a stipulation to the effect of their acting jointly, or leaving it unmentioned amount to such stipulation. The agency of the survivor shall remain intact if he has been appointed to act independently.

Problem # 22. Agency is a legal contract from both parties, (i.e., it can be revoked by either of them). So the agent may release himself from the agency regardless whether the principal is present or absent. Similarly, the principal may also dismiss him, but it is a condition for his removal by the principal that his removal must be brought to his knowledge. So if the principal dismisses the agent, but does not inform the agent about it, he shall not be dismissed 9from the agency), and so if the agent performs something assigned to him before the news of his dismissal by the principal reaches him, it shall be enforceable, although he may be informed about his dismissal by a trustworthy person.

Problem # 23. The Agency terminates by the death of the agent, and similarly by the death of the principal, even if the agent may have no knowledge about the principal's death. Likewise, it terminates by the lunacy of either of them, according to the stronger opinion, in the event of its being persistent (*Irbâqī*), and, according to the more cautious opinion, even in the event of its being otherwise (i.e., intermittent or *Advārī*). According to the more cautious opinion, it also terminates by swooning (of either of them), or by the loss of the subject of Agency, or by an act of the Principal related with the subject of Agency, even if it were by mediate causation, as when he has appointed another as an agent for the sale of a commodity, but he sells it himself, or does something that is repugnant to the Agency, as he appoints another as an agent for the sale of something and then turns it into a (religious) endowment.

Problem # 24. A contract of Agency may be entered into by a plaintiff as well as a defendant for

عليه، بل يكره لذوي المروات من أهل الشرف و المناصب الجليلة أن يتولوا المنازعة و المرافعة بأنفسهم خصوصاً إذا كان الطرف بذيّ اللسان، ولا يعتبر رضا صاحبه، فليس له الامتناع عن خصومة الوكيل.

مسألة ٢٥ ـ وكيل المدعي وظيفته بث الدعوى على المدعى عليه عند الحاكم، و إقامة البينة و تعديلها، و تحليف المنكر، و طلب الحكم على الخصم و بالجملة كل ما هو وسيلة إلى الاثبات، و وكيل المدعى عليه وظيفته الإنكار، و الطعن على الشهود، و إقامة بينة الجرح، و مطالبة الحاكم بسماعها و الحكم بها، و بالجملة عليه السعي في الدفع ما أمكن.

مسألة ٢٦ ـ لو ادعى منكر الدين مثلاً في أثناء مدافعة وكيله عنه الأداء أو الابراء انقلب مدعياً و صارت وظيفة وكيله إقامة البينة على هذه الدعوى و غيرها مما هو وظيفة المدعي، و صارت وظيفة خصمه الانكار و غيره من وظائف المدعى عليه.

مسألة ٢٧ ـ لا يقبل إقرار الوكيل في الخصومة على موكله، فلو أقرّ وكيل المدعي القبض أو الابراء أو قبول الحوالة أو المصالحة أو بأن الحق مؤجل أو أن البينة فسقة أو أقر وكيل المدعى عليه بالحق للمدعي لم يقبل، و بقيت الخصومة على حالها سواء أقر في مجلس الحكم أو غيره، و ينعزل بذلك و تبطل وكالته، لأنه بعد الاقرار ظالم في الخصومة بزعمه.

مسألة ٢٨ ـ الوكيل بالخصومة لا يملك الصلح عن الحق أو الابراء منه إلا أن يكون وكيلاً في ذلك أيضاً بالخصوص.

مسألة ٢٩ ـ يجوز أن يوكل إثنين فصاعداً بالخصومة كسائر الأمور فان لم يصرح باستقلال كل منهما و لم يكن لكلامه ظهور فيه لم يستقل بها أحدهما، بل يتشاوران و يتباصران و يعضد كل منهما صاحبه و يعينه على ما فوض إليهما.

مسألة ٣٠ ـ لو وكل رجل وكيلاً بحضور الحاكم في خصوماته و استيفاء حقوقه

settlement of a dispute as well as in litigation. It is, however, disapproved for honourable persons

from among the nobility as well as high-ranking persons to indulge in disputes and litigation themselves, particularly when the other party is an audacious (lit., a foul-mouthed) person. The consent of the other party is not a condition (for the validity of such Agency). So the other party is not entitled to refrain from the settlement of the dispute by the agent.

Problem # 25. It is the duty of the plaintiff's agent to file the case against the defendant before a judge, adducing evidence and settlement of the case, arranging oath by the recusant and demand the judgement against the opposing party, in short, adopt all means for the establishment of the principal's claim. (On the other hand), it is the duty of the defendant's agent to reject the plaintiff's claim and cross-examine the witnesses produced by the plaintiff, adduce evidence in favour of his client, demand the judge to hear it and give his judgement in its favour, in short, to endeavour as far as possible to defend (his client).

Problem # 26. If during the course of defence by the agent, the person, for example, denying the debt claims to have repaid it or having been released from it, he shall become a plaintiff, and his agent shall become bound to adduce in favour of this claim and do all that is required by the plaintiff, while the opposing party shall be bound to deny it and do all that is required by a defendant.

Problem # 27. In a dispute, no admission by the agent against his client shall be admissible. So if the plaintiff's attorney acknowledges that his client has taken possession of the subject of litigation or has released the debtor or has accepted a Ḥ*avālah*, or has compromised, or that the claim is a deferred one, or the evidence adduced by his client is vicious, or the defendant's attorney admits that the plaintiff is right in his claim, it shall not be accepted, and the dispute shall remain as it is, whether such admission has been made before the court or elsewhere, and he shall thereby be dismissed and his Agency shall thereby be terminated, as after such admission, his client happens to be on the wrong.

Problem # 28. An attorney in a dispute is not entitled to make a compromise with the opposing part or release him (from his liability), except when he has been given such authority particularly.

Problem # 29. A person may appoint two or more persons as attorney in a dispute as in other cases. If he fails to clarify that they shall act independently, nor is it apparent from the context, none of them shall act independently. Rather they shall consult, inform and help each other in the job they have been assigned.

Problem # 30. If a person appoints another as his attorney to appear before a judge in his disputes and

مطلقا أو في خصومة شخصية ثم قدم الوكيل خصماً لموكله و أقام الدعوى عليه يسمع الحاكم دعواه عليه، و كذا إذا ادعى عند الحاكم وكالته في الدعوى و أقام البينة عنده عليها، و أما إذا ادعاها من دون بينة فان لم يحضر خصماً عنده أو أحضر و لم يصدقه في وكالته لم يسمع دعواه ولو صدقه فيها فالظاهر أنه يسمع دعواه لكن لم تثبت بذلك وكالته عن موكله بحيث تكون حجة عليه، فاذا قضت موازين القضاء بحقية المدعي يلزم المدعى عليه بالحق، ولو قضت بحقية المدعى عليه فالمدعي على حجته فاذا أنكر الوكالة تبقى دعواه على حالها، و للمدعى عليه أو وكيل المدعي إقامة البينة على ثبوت الوكالة، و مع ثبوتها بها تثبت حقية المدعى عليه في مهية الدعوى.

مسألة ٣١ ـ لو وكله في الدعوى و تثبيت حقه على خصمه لم يكن له بعد الاثبات قبض الحق، فللمحكوم عليه أن يمتنع عن تسليم ما ثبت عليه إلى الوكيل.

مسألة ٣٢ ـ لو وكله في استيفاء حق له على غيره فجحده من عليه الحق لم يكن للوكيل مخاصمته و مرافعته وتثبيت الحق عليه مالم يكن وكيلاً في الخصومة.

مسألة ٣٣ ـ يجوز التوكيل بجعل و بغيره، و انما يستحق الجعل في الأول بتسليم العمل الموكل فيه، فلو وكّله في البيع أو الشراء و جعل له جعلاً فله المطالبة به بمجرد إتمام المعاملة و إن لم يتسلم الموكل الثمن أو المثمن و كذا لو وكله في المرافعة و تثبيت الحق استحقه بمجرد إثباته و إن لم يتسلمه الموكل.

مسألة ٣٤ ـ لو وكله في قبض دينه من شخص فمات قبل الأداء لم يكن له مطالبة وارثه إلا أن تشملها الوكالة.

مسألة ٣٥ ـ لو وكله في استيفاء دينه من زيد فجاء إليه للمطالبة فقال زيد: خذ هذه الدراهم واقض بها دين فلان ـ أي موكله ـ فأخذها صار وكيل زيد في قضاء دينه، و كانت الدراهم باقية على ملك زيد ما لم يقبضها صاحب الدين، و للوكيل أن يقبض نفسه بعد أخذه من المديون بعنوان الوكالة عن الدائن في الاستيفاء إلا أن يكون توكيل المديون بنحو لا يشمل قبض الوكيل، فلزيد

settlement of his claims in general terms or in a specific dispute, and then the attorney becomes a party opposing his own client, and files a case against him, the judge shall entertain his claim against the client. The same shall be the case if the attorney claims before the judge of having been appointed as attorney in the client's dispute, and produces evidence in favour of his claim. If, however, he submits his claim without evidence in its favour, but does not produce the opposing party before the judge, or produces him but the latter does not confirm his claim for having been appointed as his Attorney, his claim shall not be entertained. If, however, his client confirms his claim, then apparently his claim shall be entertained, but his appointment as attorney shall not thereby be established in a way that it may be a proof against his client. If the rules of law prove that the plaintiff is on the right, his right shall become binding on the defendant. If, however, it is proved that the defendant is on the right, the plaintiff shall stand on his claim. If the defendant denies having appointed him as his attorney, his claim shall remain as it is, and the defendant or the plaintiff's attorney shall have to adduce evidence in favour of the appointment as an Attorney. By its establishment, it shall be proved that the defendant is on the right as far as the claim itself is concerned.

Problem # 31. If a person appoints another as his attorney in the dispute and establishment of his claim against his opposing party, the attorney shall not be entitled to receive the right claimed by his client after it has been established (by the court), and the party against whom judgement has been made shall be entitled to deny handing over the right to the attorney of the plaintiff.

Problem # 32. If a person appoints another as his agent for the settlement of his right against a third person, the agent shall not be entitled to enter into a dispute and litigation against the other party and establish his client's right against him, unless he has been appointed an attorney in the dispute.

Problem # 33. A person may be appointed an agent against a *Ja'l* (wages, in a *Ju'alah*) , etc.In the first case, he may be entitled to receive the wages (*Ja'l*) after the performance of the job assigned to him. So if he has been appointed an agent in a sale or purchase, and a *Ja'l* has been fixed for him, he shall be entitled to demand it as soon as the transaction is finalised, even if the price or the object of sale has not been delivered. Likewise, if a person is appointed an attorney in a litigation or establishment of the right, he shall be entitled to his remuneration as soon as the right is established, even if it is not delivered to the client.

Problem # 34. If a person is appoint an agent by another for receiving a debt from a third person, and that person dies before the payment of the debt, the agent shall not be entitled to demand it from the heirs of the deceased, unless this was also incorporated in the Agency.

Problem # 35. If a person appoints another as his agent to settle his debt with Zayd, and he comes to Zayd to demand it, and Zayd says to him: "Take these Dirhams and pay off the debt of such person, i.e., his client,", and he receives the Dirhams, he shall thereby become Zayd's agent for the settlement of his debt, as long as the Dirhams remain in his possession and they are not paid to the owner of the

استردادها ما دامت في يد الوكيل و لم يتحقق القبض من الدائن بنحو مما ذكر، ولو تلفت عنده بقي الدين بحاله، ولو قال: خذها عن الدين الذي تطالبني به لفلان فأخذها كان قابضاً للموكل و برأت ذمة زيد، و ليس له الاسترداد.

مسألة ٣٦ ـ الوكيل أمين بالنسبة إلى ما في يده لا يضمنه إلا مع التفريط أو التعدي، كما إذا لبس ثوباً أو حمل على دابة كان وكيلاً في بيعها لكن لا تبطل بذلك وكالته، فلو باع الثوب بعد لبسه صح بيعه، و إن كان ضامناً له لو تلف قبل أن يبيعه، و بتسليمه إلى المشتري يبرأ عن ضمانه، بل لا يبعد ارتفاع ضمانه بنفس البيع.

مسألة ٣٧ ـ لو وكله في إيداع مال فأودعه بلا إشهاد فجحد الودعي لم يضمنه الوكيل إلا إذا وكله في أن يودعه مع الاشهاد فخالف، و كذا الحال لو و كله في قضاء دينه فأداه بلا إشهاد و أنكر الدائن.

مسألة ٣٨ ـ لو وكله في بيع سلعة أو شراء متاع فان صرح بكون البيع أو الشراء من غيره أو بما يعم نفسه فلا إشكال، و إن أطلق و قال: أنت وكيلي في أن تبيع هذه السلعة أو تشتري لي المتاع الفلاني، فهل يعم نفس الوكيل؟ فيجوز أن يبيع السلعة من نفسه أو يشتري له المتاع من نفسه أم لا؟ و جهان بل قولان، أقواهما الأول و أحوطهما الثاني.

مسألة ٣٩ ـ لو اختلفا في التوكيل فالقول قول منكره، ولو اختلفا في التلف أو في تفريط الوكيل فالقول قول الوكيل، ولو اختلفا في دفع المال إلى الموكل فالظاهر أن القول قول الموكل خصوصاً إذا كانت الوكالة بجعل، و كذا الحال فيما إذا اختلف الوصي و الموصى له في دفع المال الموصى به إليه، و الأولياء حتى الأب و الجد إذا اختلفوا مع المولى عليه بعد زوال الولاية عليه في دفع ماله إليه، فان القول قول المنكر في جميع ذلك، نعم لو اختلف الأولياء مع المولى عليهم في الانفاق عليهم أو على ما يتعلق بهم في زمان ولايتهم فالظاهر أن القول قول الأولياء بيمينهم.

debt [i.e., his client, or Zayd's creditor]. The agent shall be entitled to take possession of the Dirhams after having received them from the debtor as the agent of the creditor in settlement of the debt, except when the Agency is such that it does not include the agent's taking possession [of the debt]. Zayd is entitled to get the Dirhams back as long as they are in the possession of the agent and have not been paid to the creditor in the way already mentioned. If they are lost, the debt shall remain as it is. If Zayd says to the agent: "Take these Dirhams against the debt you are demanding from me on behalf of such person," and the agent receives them. In this case, the agent shall take possession [of the Dirhams] on behalf of his client, and Zayd is absolved of his liability, but he shall not be entitled to get them back from the agent.

Problem # 36. An agent is a trustee in relation to what is in his possession, and is not liable [for its loss] unless it has been the result of his commission or omission, as when he puts on the garment or loads a beast of burden, he was assigned the job of selling them. His Agency is, however, not thereby revoked. So if he sells the garment after wearing it, the sale shall be valid, though he shall be held responsible, if it is lost before it is sold, but as soon as it is delivered to the buyer, he is absolved of the liability for it. Rather, it is not far from his being relieved of the liability by the sale itself.

Problem # 37. If an agent is assigned the job of depositing some property, and he deposits it without any witnesses, and the person with whom it is deposited denies (having received it). The agent shall not be held responsible for it, unless he had been assigned to deposit it with witnesses, and he had contravened it. The same shall be the case if he is assigned the job of paying off a debt, and he pays it off without witnesses, and the creditor denies (having received it).

Problem # 38. If an agent has been assigned the job of selling a commodity or purchasing a property, if it has been clarified that the agent may sell or purchase anything else too, or enter into a transaction on his own behalf, there is no objection. If it has been left unmentioned, so that the client says: "You are my agent in selling this commodity or buying a property from such person," then shall the agent be entitled to enter into the transaction on his own behalf, so that he sells the commodity by himself, or purchases the property by himself, or not, is a question that has two alternatives, rather two opinions, the stronger being favour of the first, while the more cautious being in favour of the latter.

Problem # 39. If [the agent and his client] differ regarding an Agency, the word of the denying party shall be entertained. If they differ regarding loss or the omission on the part of the agent, then the word of the agent shall be preferred. If they differ regarding the delivery of the goods to the client, then apparently the word of the client shall be given preference, particularly when the Agency had been in the form of *Ja'l*. The same shall be the rule if the executor and the legatee differ regarding the delivery of the subject of the will, or if the guardians, including even the father and grandfather, differ with the ward after the termination of their guardianship on him regarding the delivery some goods to him, so that the word of the denying person shall be preferred in all these cases. If, however, the guardians differ with their wards regarding the money spent on their maintenance or what belonged to them during their guardianship, then apparently the word of the guardians shall be preferred provided that it is followed by their oath.

كتاب الاقرار

و هـو الاخبـار الجازم بحق لازم على المخبر أو بما يستتبع حقاً أو حكماً عليه، أو بنفي حق له أو ما يستتبعه كقوله: له أو لك عليّ كذا، أو عندي أو في ذمتي كذا، أو هذا الذي في يدي لفلان، أو اني جنيت على فلان بكذا، أو سرقت أو زنيت و نحو ذلك ممايستتبع القصاص أو الحد الشرعي، أو ليس لي على فلان حق، أو أن ما أتلفه فلان ليس مني و ما أشبه ذلك بأي لغة كان، بل يصح إقرار العربي بالعجمي و بالعكس، و الهندي بالتركي و بالعكس إذا كان عالماً بمعنى ما تلفظ به في تلك اللغة، و المعتبر فيه الجزم بمعنى عدم إظهار الترديد و عدم الجزم به، فلو قال: أظن أو أحتمل أن لك عليّ كذا ليس إقراراً.

مسألة ١ ـ يعتبر في صحة الاقرار بل في حقيقته و أخذ المقر باقراره كونه دالاً على الاخبار المزبور بالصراحة أو الظهور، فان احتمل إرادة غيره احتمالاً يخل بظهوره عند أهل المحاورة لم يصح، و تشخيص ذلك راجع إلى العرف و أهل اللسان كسائر التكلمات العادية، فكل كلام ولو لخصوصية مقام يفهم منه أهل اللسان أنه قد أخبر بثبوت حق عليه أو سلب حق عن نفسه من غير ترديد كان إقراراً، و إن لم يفهم منه ذلك من جهة تطرق الاحتمال الموجب للترديد و الاجمال لم يكن إقراراً.

SECTION TWENTY- SEVEN

ACKNOWLEDGEMENT

(I Q R Ā R)

Acknowledgement or *Iqrār* means giving a definite information about the right owed to the informer or what is in pursuance of a right or verdict against him, or in denying a right owed to him or what is in its pursuance, as when a person says to another: "I owe so much to such person or to you, or I have such a thing in my possession, or I am liable to pay such a thing, or this thing that is in my possession belongs to such person, or I have done such an offence against such person, or I have committed a theft, or fornication, or the like, that entails *Qiṣāṣ* or a *Ḥadd*, or I do not owe such a thing to such person, or what has been destroyed by such person does not belong to me," or the like, in whatever language.Rather an acknowledgement made is Arabic by a non-Arab, or vice versa, or in Turkish by an Indian or vice versa, is also valid, provided that he knows what declaration he has made in that language. It is a condition in an acknowledgement that it must be definite without any amount of hesitation and lack of decisiveness, as when a person says to another: "I think or it is likely that I owe so much to you," it shall not be a valid acknowledgement.

Problem # 1. It is a condition for the validity of an Acknowledgement, rather for its being real and for holding a person making it responsible for it that it must convey such information expressly or it may express so, so that if it is likely that the person making Acknowledgement has intended some one else so that it may damage such expression according to the idiom of those speaking that language, it shall not be valid. Its determination by referring to the prevalent usage by those speaking that language shall be according to the average speech. So every statement that conveys according to those speaking the language, though in a special locality, that the person making it has expressed the confirmation or denial of a right against himself unequivocally, it shall be a valid Acknowledgement. If, however, it does not convey such sense due to a likelihood entailing hesitation and brevity, it shall not be a valid Acknowledgement.

مسألة ٢ ـ لا يعتبر في الاقرار صدوره من المقر ابتداءً أو كونه مقصوداً بالافادة، بل يكفي كونه مستفاداً من تصديقه لكلام آخر و استفادته من كلامه بنوع من الاستفادة، كقوله: «نعم» في جواب من قال: «لي عليك كذا» أو «أنت جنيت على فلان» و كقوله في جواب من قال: «استقرضت مني ألفاً» أو «لي عليك ألف»: «رددته» أو «أديته» فانه إقرار بأصل ثبوت الحق عليه و دعوى منه بسقوطه، و مثل ذلك ما إذا قال في جواب من قال: «هذه الدار التي تسكنها لي»: «اشتريتها منك» فان الإخبار بالاشتراء اعتراف منه بثبوت الملك له و دعوى منه بانتقاله إليه، نعم قد توجد قرائن على أن تصديقه لكلام الآخر ليس حقيقياً فلم يتحقق الاقرار، بل دخل في عنوان الانكار، كما إذا قال في جواب من قال: «لي عليك ألف دينار»: «نعم» أو «صدقت» مع صدور حركات منه دلت على أنه في مقام الاستهزاء و التهكم و شدة التعجب و الانكار.

مسألة ٣ ـ يشترط في المقرّ به أن يكون أمراً لو كان المقر صادقاً في إخباره كان للمقر له حق الإلزام عليه و مطالبته به، بأن يكون مالاً في ذمته عيناً أو منفعة أو عملاً أو ملكاً تحت يده أو حقاً يجوز مطالبته، كحق الشفعة و الخيار و القصاص، و حق الاستطراق في درب مثلاً، و إجراء الماء في نهر، ونصب الميزاب في ملك ، و وضع الجذوع على حائط أو يكون نسباً أو جب نقصاً في الميراث أو حرماناً في حق المقر و غير ذلك أو كان للمقر به حكم و أثر كالاقرار بما يوجب الحد.

مسألة ٤ ـ انما ينفذ الاقرار بالنسبة إلى المقر، و يمضي عليه فيما يكون ضرراً عليه، لا بالنسبة إلى غيره و لا فيما يكون فيه نفع له، فان أقر بأبوة شخص له و لم يصدقه ولم ينكره يمضي إقراره في و جوب النفقة عليه لا في نفقته على المقر أو في توريثه.

مسألة ٥ ـ يصح الاقرار بالمجهول و المبهم، و يقبل من المقر و يلزم و يطالب

Problem # 2. It is not a condition in an Acknowledgement that it must be initially expressed or to intend to convey such sense by his statement. Rather it is sufficient that it may be understood by the person's confirmation of a statement made by another, and it may be understood to convey such sense, as when he replies in the affirmative if another person says to him: "You are indebted to me so much", or "You have committed such an offence against such person," or when a person says to him: "You have taken a loan of one thousand (Dirhams) from me," or "You owe one thousand (Dirhams) to me," and he replies: "I have returned them to you," or "I have repaid them," it will establish the actual right against him, though it may be a claim of its having dropped. Similar shall be the case when a person says to him: "This house in which you live belongs to me,' and he replies: "I have purchased it from you," then his statement of purchasing the house from him is a confirmation of that person's ownership of the house, though it is followed by his claim of having purchased it from him. Of course, sometimes the context says that his reply to the statement of another is not actually a confirmation of that person's statement, and so it does not mean an Acknowledgement; rather, it is a denial, as when a person says to another: "You owe to me one thousand Dīnārs," and the latter replies, "Yes", or "You are telling the truth," while he makes some signs that signify that his reply has been made by way of ridicule, mockery or utter astonishment or denial.

Problem # 3. It is a condition in the thing about which an Acknowledgement has been made that it must be something if the Acknowledger is true in his statement, the Acknowledgee may be entitled to bind him for it and demand its fulfilment from him, so that it may be a property owed by him in the form of a real estate, a usufruct, an act, or a property in his possession or a right that may be demanded from him, as the right of pre-emption, a right of option, *Qiṣāṣ*, a right of passage, for example, through a gate, carrying water in a canal, installing a drain pipe in his property, putting girders on his wall, or parentage entailing reduction in his share of inheritance or deprivation of his right, or the like, of the object of Acknowledgement may be a decree or its consequence like an Acknowledgement entailing the liability for *Ḥadd*.

Problem # 4. An Acknowledgement is enforceable in so far as it concerns the Acknowledger, and shall be enforced in case it is to his disadvantage, but not to some one else, nor in case it is in his own advantage. So if a person acknowledges another to be his parent, and the other party does neither confirm nor deny it, it shall be enforced in so far as it relates to his liability of maintaining another, but not his own maintenance by another or his right of inheritance from another.

Problem # 5. An Acknowledgement in respect of an anonymous or ambiguous object is valid, and it is acceptable from the Acknowledger and binding on him, and its fulfilment shall be demanded from him

بالتفسير و البيان و رفع الابهام، و يقبل منه ما فسره به، و يلزم به لو طابق تفسيره مع المبهم بحسب العرف و اللغة وأمكن بحسبها أن يكون مراداً منه، فلو قال: «لك عندي شيء» ألزم بالتفسير فان فسره بأيّ شيء صح كونه عنده يقبل منه و إن لم يكنْ متمولاً كهرة مثلاً أو نعل خلق لا يتمول، وأما لو قال: «لك عندي مال» لم يقبل منه إلا إذا كان ما فسره من الأموال عرفاً و إن كانت ماليته قليلة جداً.

مسألة ٦ ـ لو قال: «لك أحد هذين» مما كان تحت يده أو «لك عليّ إما وزنة من حنطة أو شعير» ألزم بالتفسير و كشف الابهام، فان عيّن ألزم به لا بغيره، فان لم يصدّقه المقر له و قال: «ليس لي ما عينت» فان كان المقر به في الذمة سقط حقه بحسب الظاهر إذا كان في مقام الاخبار عن الواقع لا إنشاء الاسقاط لو جوزناه بمثله، و إن كان عيناً كان بينهما مسلوباً بحسب الظاهر عن كل منهما، فيبقى إلى أن يتضح الحال، ولو برجوع المقر عن إقراره أو المنكر عن إنكاره، ولو ادعى عدم المعرفة حتى يفسره فان صدّقه المقر له وقال: أنا أيضاً لا أدري فالأقوى القرعة و إن كان الأحوط التصالح، وإن ادعى المعرفة و عيّن أحدهما فان صدّقه المقر فذاك و إلا فله أن يطالبه بالبينة، و مع عدمها فله أن يحلّفه، و إن نكل أو لم يمكن إحلافه يكون الحال كما لو جهلا معاً، فلا محيص عن التخلص بما ذكر فيه.

مسألة ٧ ـ كما لا يضر الابهام و الجهالة في المقر به لا يضران في المقرّله، فلو قال: «هذه الدار التي بيدي لأحد هذين يقبل» و يلزم بالتعيين فمن عيّنه يقبل، و يكون هو المقر له، فان صدّقه الآخر فهو، و إلا تقع المخاصمة بينه و بين من عيّنه المقر، ولو ادعى عدم المعرفة و صدّقاه فيه سقط عنه الالزام بالتعيين، ولو ادعيا أو أحدهما عليه العلم كان القول قوله بيمينه.

مسألة ٨ ـ يعتبر في المقر البلوغ و العقل والقصد والاختيار، فلا اعتبار باقرار الصبي و المجنون والسكران، و كذا الهازل و الساهي و الغافل و المكره، نعم لا

after the object has been explained and determined and the ambiguity removed, and it shall be accepted as explained by him, and it shall be binding on him if his interpretation of the ambiguous object conforms to the prevalent custom and usage, and the object in conformity with the prevalent custom and usage may be likely tom be what is intended by him. So if he says: "I have something with me that is your property," he shall be bound to interpret it.

Now, his interpretation about whatever is lawful for him to possess shall be acceptable, even if it has no value, as, for example, a cat or an old shoe that has no value. If, however, he says to another: "I have some valuable thing with me belonging to you," his interpretation of the thing by him shall not be acceptable unless it was something that is usually a valuable thing, even if its value may be very small.

Problem # 6. If a man says to another: "One of these two things belongs to you," about the things that were in his possession, or "I owe to you an amount of wheat or barley," he shall be bound to explain and remove ambiguity. If he determines it, he shall be bound by it and not by any thing other than that. If the Acknowledgee does not confirm it, and says: "The thing determine by you does not belong to me," if the Acknowledger is liable to pay the object of Acknowledgement, he shall be absolved of the liability and the right of the Acknowledgee shall apparently drop, in case the Acknowledgee is declaring what is the actual position, and is not pronouncing the formula of absolving the Acknowledger, if we have permitted such cases. If it were a real estate, both shall be deprived of it, and it shall remain there until the actual fact comes to light, whether the fact comes to light by the Acknowledger's denial of his Acknowledgement or by the withdrawal of the person denying it. If the Acknowledger claims to be ignorant, and that, therefore, he is unable to explain, then if the Acknowledgee confirms it and says: "I also do not know," then, according to the stronger opinion, the matter shall be decided by casting lots, though it is more cautious to reach a compromise. If he claims to have knowledge about it, and determines one of the two things, then if the Acknowledger also confirms it, well as good; otherwise, he shall be entitled to ask him to adduce evidence in favour of his claim, and in its absence to take an oath. In case he refrains, or it is not possible to take oath from him, the matter shall be decided as if both of them were ignorant, and so there is no other alternative but to find a solution by casting lots or reaching a compromise.

Problem # 7. As the ambiguity and ignorance cause no harm to the object of Acknowledgement, they also do no harm to the Acknowledgee. If the Acknowledger says: "This house under my possession belongs to one these two persons," it shall be entertained, and he shall be compelled to determine [as to which of the two persons is its owner]. If he determines one of them to be the owner, it shall be accepted, and he shall be the Acknowledgee. If the other party confirms it, well and good. Otherwise, the dispute shall remain between him and the other party determined by the Acknowledger. If he claims ignorance, and both the parties also confirm it, his compulsion to determine either of them shall drop. If either or both of them claim that he has knowledge, his word shall be preferred provided it is followed by his oath.

Problem # 8. It is a condition that the Acknowledger must be an adult, sane, and having intention and free will, so that an Acknowledgement made by a minor, lunatic or intoxicated person shall not be valid.

يبعد صحة إقرار الصبي إن تعلق بما له أن يفعله، كالوصية بالمعروف ممن له عشر سنين.

مسألة ٩ ـ إن أقر السفيه المحجور عليه بمال في ذمته أو تحت يده لم يقبل، و يقبل فيما عدا المال كالطلاق و الخلع بالنسبة الى الفراق لا الفداء، و كذا في كل ما أقر به و هو يشتمل على مال و غيره لم يقبل بالنسبة إلى المال كالسرقة، فيحد إن أقر بها، و لا يلزم بأداء المال.

مسألة ١٠ ـ يقبل إقرار المفلس بالدين سابقاً و لا حقاً، لكن لم يشارك المقر له مع الغرماء بتفصيل مر في كتاب الحجر، كما مر الكلام في إقرار المريض بمرض الموت، و أنه نافذ إلا مع التهمة فينفذ بمقدار الثلث.

مسألة ١١ ـ لو ادعى الصبي البلوغ فان ادعاه بالانبات اختبر، ولا يثبت بمجرد دعواه، وكذا إن ادعاه بالسن، فانه يطالب بالبينة، و أما لو ادعاه بالاحتلام في الحد الذي يمكن وقوعه فثبوته بقوله بلا يمين بل معها محل تأمل و إشكال.

مسألة ١٢ ـ يعتبر في المقر له أن يكون له أهلية الاستحقاق، فلو أقر لدابة بالدين لغا ، و كذا لو أقر لها بملك، و أما لو أقر لها باختصاصها بجل و نحوه كأن يقول: «هذا الجل مختص بهذا الفرس» أو لهذا مريداً به ذلك فالظاهر أنه يقبل و يحكم بمالكية مالكها، كما أنه يقبل لو أقر لمسجد أو مشهد أو مقبرة أو رباط أو مدرسة و نحوها بمال خارجي أو دين، حيث ان المقصود منه في التعارف اشتغال ذمته ببعض ما يتعلق بها من غلة موقوفاتها أو المنذور أو الموصى به لمصالحها و نحوها.

مسألة ١٣ ـ لو كذّب المقر له المقر في إقراره فان كان المقر به ديناً أو حقاً لم يطالب به المقر، و فرغت ذمته في الظاهر، و إن كان عيناً كانت مجهولة المالك بحسب الظاهر، فتبقى في يد المقر أو الحاكم إلى أن يتبين مالكها، هذا بحسب الظاهر، و أما بحسب الواقع فعلى المقر بينه و بين الله تعالى تفريغ ذمته من

Same is the case with a joking, inadvertent and negligent person and one acting under duress. Of course, Acknowledgement by a minor about something that he is entitled to do is not far from being valid, as a will for beneficence by a minor who has attained ten years of age.

Problem # 9. If a person interdicted due to idiocy makes an Acknowledgement of some property owed by him or under his possession, it shall not be entertained. It shall be accepted except what relates to financial liability as a Divorce or *Khul'* as far as it relates to separation but not the ransom. The same rule applies to all Acknowledgements made by him that include some financial as well other liability, so that what relates to the financial liability shall not be entertained, as theft, so that he shall be inflicted *Ḥadd* if he has confessed of having committed it, but he shall not be liable to make financial payment.

Problem # 10. An Acknowledgement made by an insolvent person prior and subsequent to insolvency shall be entertained, but the Acknowledgee shall not be included in the list of the debtors as already mentioned in detail under Section [Twenty-Three] on Interdiction, as mentioned under the Acknowledgement made by a sick person during an ailment resulting in his death, so that it is enforceable except in case of suspicion, and shall be enforced up to the amount of one-third [of the deceased's property].

Problem # 11. If a minor claims to have attained puberty, then if it is accompanied by the growth of the pubic hair, he shall be examined, and his claim shall not be entertained by his mere word. The same rule shall apply in case of his claim about his age, so that he shall be asked to adduce evidence in favour of his claim. If, however, he claims to be having nocturnal pollution at the age where it is possible to take place, his word shall be sufficient for its proof, without being followed by an oath. Rather with an oath, there is hesitation and difficulty.

Problem # 12. It is a condition for the Acknowledgee that he must possess competence for the title. So if a person makes an Acknowledgement of owing a debt to a quadruped animal, it shall be void. The same rule shall apply if he makes an Acknowledgement about its having ownership. If, however, it relates to a special reservation of a horsecloth or the like for it, by saying: "This horsecloth is reserved for this horse," or "it belongs to this horse," intending thereby the same, then apparently it shall be entertained, and verdict shall be given in four of the ownership of the owner, as when an Acknowledgement is entertained when it is made in regard to an external property or debt for a mosque, Meshed, a mausoleum, a caravanserai or a religious school or the like, where the intention is to involve himself with liability for something relating them according to the prevalent custom as the cereals of its endowments, or votive offerings or what is bequeathed for its interests, or the like.

Problem # 13. If the Acknowledgee repudiates the Acknowledger's Acknowledgement, then if the subject of Acknowledgement were a debt or a title, it shall be demanded from the Acknowledger, and shall apparently be absolved of his liability. If it were a real estate with an unknown owner, according to what is apparent, it shall remain in the possession of the Acknowledger or the judge until its owner turns out. This is according to what is apparent. But according to the factual position, it shall be up to the Acknowledger to absolve himself of his liability of the debt between himself and Allah, the Exalted, by

الدين، و تخليص نفسه من العين بالايصال إلى المالك و إن كان بدسه في أمواله، ولو رجع المقر له عن إنكاره يلزم المقر بالدفع مع بقائه على إقراره، و إلا ففيه تأمل.

مسألة ١٤ ـ لو أقر بشيء ثم عقبه بما يضاده و ينافيه يؤخذ باقراره و يلغى ما ينافيه، فلو قال: «له عليّ عشرة لا بل تسعة» يلزم بالعشرة، ولو قال: «له علي كذا و هو من ثمن الخمر أو بسبب القمار» يلزم بالمال و لا يسمع منه ما عقبه، و كذا لو قال: «عندي وديعة و قد هلكت» فان إخباره بتلفها ينافي قوله: «عندي» الظاهر في وجودها عنده، نعم لو قال: «كانت له عندي وديعة وقد هلكت» فلا تنافي بينهما، وهو دعوى لابد من فصلها على الموازين الشرعية.

مسألة ١٥ ـ ليس الاستثناء من التعقيب بالمنافي، بل يكون المقر به ما بقي بعد الاستثناء إن كان من المثبت و نفس المستثنى إن كان من المنفي، فلو قال: «هذه الدار التي بيدي لزيد إلا القبة الفلانية» كان إقراراً بما عداها ولو قال: «ليس له من هذه الدار إلا القبة الفلانية» كان إقراراً بها، هذا إذا كان الاخبار متعلقاً بحق الغير عليه، و أما لو كان متعلقاً بحقه على الغير كان الأمر بالعكس، فلو قال: «لي هذه الدار إلا القبة الفلانية» كان إقراراً بالنسبة إلى نفي حقه عن القبة، فلو ادعى بعده استحقاق تمام الدار لم يسمع منه، ولو قال: «ليس لي من هذه الدار إلا القبة الفلانية» كان إقراراً بعدم استحقاق ما عدا القبة.

مسألة ١٦ ـ لو أقر بعين لشخص ثم أقر بها لشخص آخر كما إذا قال: «هذه الدار لزيد» ثم قال: «لعمرو» حكم بكونها للأول و أعطيت له، و أغرم للثاني بقيمتها.

مسألة ١٧ ـ من الأقارير النافذة الاقرار بالنسب كالبنوة و الأخوة و نحوهما، و المراد بنفوذه إلزام المقر وأخذه باقراره بالنسبة إلى ما عليه من وجوب إنفاق و حرمة نكاح أو مشاركته معه في إرث أو وقف و نحو ذلك و أما ثبوت النسب بينهما

releasing himself of the real estate by taking it to the owner, even if by putting it secretly in his property. If the Acknowledgee withdraws his denial, the Acknowledger shall be bound to deliver it to the deliver it to him by sticking to his Acknowledgement. Otherwise, there shall be hesitation [in solution of the case].

Problem # 14. If a person makes an Acknowledgement of something and then follows by what is contrary to and in contradiction of it, he shall be bound by his first Acknowledgement and what is contrary to it shall be declared null and void. So if he says: "I owe to him ten [Dirhams]. No, rather nine [Dirhams]", he shall be liable to pay ten [Dirhams]. If he says: "I owe to him so much, and that is the price of wine or due to gambling," he shall be bound to pay the money, and what follows shall not be heeded to. Likewise, if he says: "I have been entrusted something in custody, and it has been destroyed," his statement that it has been destroyed is contrary to what he has said: "I have with me," that implies the existence of what is with him. Of course, if he says: "I had with me something entrusted to me in custody that has been destroyed," then there is no contradiction between them, and it is a claim that is to be decided according to the principles of law.

Problem # 15. There is no exception in case of what contradiction follows an Acknowledgement, so that what remains after the exception is the subject of Acknowledgement if it were in the affirmative, and it is what is made the exception if it were in the negative. If he says: "This house in my possession belongs to Zayd except such room," his Acknowledgement shall relate to the house and not to the room. If, however, he says: "He has nothing in this house except such room." The Acknowledgement shall relate to the room. This is the case when the statement relates to the title of another. If, however, the statement relates to his title against that of another, the case shall be reverse. If he says: "I have this house except such room," his Acknowledgement shall relate to the negation of his title in regard to the room, so that if later he claims to the title of the whole house, it shall not be entertained. If he says: "Nothing of this house belongs to me except such room," the Acknowledgement shall relate to the negation of his title except the room.

Problem # 16. If a person makes an Acknowledgement of a real to belong to another, and then he makes it to belong to a third person, as when he says: "This house belongs to Zayd." Then he says: "[This house] belongs to 'Amr." The judgement shall be given in favour of its belonging to the former and it shall be given to him, while he shall pay its price to the latter as a fine.

Problem # 17. Among the enforceable Acknowledgements is the Acknowledgement of *Nasab*, as filiation and fraternity, and the like. By its being enforceable is meant that the Acknowledger is bound by it, and he is responsible for his Acknowledgement in relation to what liabilities it entails as the obligation of maintenance, prohibition of marriage, his partnership in inheritance and endowment, and the like. As regards the establishment of the *Nasab* between two parties, so that all its consequences may come into force, it has detailed rules. They include that if the Acknowledgement relates to a child, and he were

بحيث يترتب جميع آثاره ففيه تفصيل، و هو أنه إن كان الاقرار بالولد و كان صغيراً غير بالغ يثبت به ذلك إن لم يكذّبه الحس و العادة ـ كالاقرار ببنوة من يقاربه في السن بما لم يجر العادة بتولده من مثله ـ ولاالشرع ـ كاقراره ببنوة من كان ملتحقاً بغيره من جهة الفراش و نحوه ـ و لم ينازعه فيه منازع فينفذ إقراره، و يترتب عليه جميع آثاره، و يتعدى الى أنسابهما، فيثبت به كون ولد المقر به حفيداً للمقر، و ولد المقر أخاً للمقربه، و أبيه جده، و يقع التوارث بينهما، و كذا بين أنسابهما بعضهم مع بعض، و كذا الحال لو كان كبيراً و صدق المقر مع الشروط المزبورة، و ان كان الاقرار بغير الولد و ان كان ولد ولد فان كان المقر به كبيراً و صدّقه أو صغيراً و صدّقه بعد بلوغه مع إمكان صدقه عقلاً و شرعاً يتوارثان إن لم يكن لهما وارث معلوم محقق، و لا يتعدى التوارث الى غيرهما من أنسابهما حتى أولادهما، و مع عدم التصادق أو وجود وارث محقق غير مصدّق له لا يثبت بينهما النسب الموجب للتوارث إلا بالبينة.

مسألة ١٨ ـ لو أقر بولد صغير فثبت نسبه ثم بلغ فأنكر لم يلتفت إلى انكاره.

مسألة ١٩ ـ لو أقر أحد ولدي الميت بولد آخر له و أنكر الآخر لم يثبت نسب المقرّبه، فيأخذ المنكر نصف التركة، و المقرّ ثلثها بمقتضى إقراره، و المقرّبه سدسها، و هو تكملة نصيب المقر و قد تنقص بسبب اقراره.

مسألة ٢٠ ـ لو كان للميت اخوة و زوجة فأقرت بولد له كان لها الثمن و الباقي للولد ان صدّقها الاخوة، و ان أنكروا كان لهم ثلاثة أرباع، و للزوجة الثمن، و باقي حصتها للولد.

مسألة ٢١ ـ لومات صبي مجهول النسب فأقر شخص ببنوته فمع امكانه وعدم منازع له يثبت نسبه و كان ميراثه له.

مسألة ٢٢ ـ لو أقر الورثة بأسرهم بدين على الميت أو بشيء من ماله للغير كان مقبولاً، ولو أقر بعضهم و أنكر بعض فان أقر اثنان وكانا عدلين ثبت الدين على الميت، و كذا العين للمقر له بشهادتهما، و ان لم يكونا عدلين أو كان المقر

a minor, non-adult, it shall thereby be established if it is not contradicted by observation and usual custom, as the Acknowledgement of filiation by person who is so close in age that a birth does not take place in similar cases, and it is also opposed by law, as an Acknowledgement of filiation who is attached with another through wedlock or the like, and there is no one to dispute it, then his Acknowledgement shall be enforceable, and all its consequence shall apply to him, and it shall extend up to their respective *Nasabs* (descents). It shall thereby be established that the son of the person for whom the Acknowledgement has been made is the grandchild of the Acknowledger, and the Acknowledger's son is the brother of the person for whom the Acknowledgement has been made, and his father his grandfather, and mutual inheritance shall ensue between them, and likewise between their *Ansāb* each inheriting the other. The same shall be the case if he was an adult, and the Acknowledgement is confirmed according to the above conditions. If the Acknowledgement is not meant to declare another his son, but his grandson, and in case the person Acknowledged happens to be an adult, and he confirms the Acknowledgement, or if he was a minor, he happens to confirm it after attaining adulthood while there is possibility of its confirmation according to the dictates of reason and law, they shall inherit each other, provided that there is already no real heir to both of them, and the mutual inheritance does not extend to others related by consanguinity [*Nasab*] including their children, while they have not confirmed each other's relation or there is his confirmed heir who has not confirmed the relation, the relation by *Nasab* entailing mutual inheritance between them shall not be established except by means of evidence.

Problem # 18. If a person makes an acknowledgement regarding a minor child, and then his parentage is established, and then he attains adulthood, and denies it, no heed shall be paid to his denial.

Problem # 19. If one of the two sons of a deceased person acknowledges that the deceased has another son, but the other denies it, no parentage shall be established between the deceased and the third son, and the son denying the parentage shall receive half of the deceased's property, while the one acknowledging the parentage of the third son shall get a third in consequence of his acknowledgement, the son in whose favour the acknowledgement has been made shall receive a sixth, and that is the complement of the acknowledging son that has been reduced due to his acknowledgement.

Problem # 20. If the deceased is survived by brethren and a wife who acknowledges the existence of a son, she shall have an eighth, and the remainder shall go to the son, if her statement is confirmed by the brethren. In case they deny her statement, they shall receive $3/4^{th}$ of the property, while the wife an eighth, and the rest of her shall go to the son.

Problem # 21. If a minor child of unknown parentage dies, and a person acknowledges as his son, then in case of its possibility and absence of any disputant party, his parentage shall be established, and the inheritance of the Acknowledger shall go to the deceased.

Problem # 22. If all the heirs of a deceased person acknowledge that the deceased owed a debt or that some of his property belongs to some one else, it shall be entertained.

واحداً نفذ اقرار المقر في حق نفسه خاصة، و يؤخذ منه من الدين الذي أقر به مثلاً بنسبة نصيبه من التركة، فاذا كانت التركة مأة و نصيب كل من الوارثين خمسين، فأقر أحدهما لأجنبي بخمسين وكذّبه الآخر أخذ المقر له من نصيب المقر خمسة و عشرين، و كذا الحال فيما إذا أقر بعض الورثة بأن الميت أوصى لأجنبي بشيء و أنكر الآخر، فانه نافذ بالنسبة إليه لا غيره.

If some of them acknowledge it, while the others deny it, then if two of them acknowledge it and they happen to be morally sound persons, the debt against the deceased shall be established. Similarly, a real estate shall belong to the Acknowledgee by the testimony of both of them. I, however, they were not morally sound, or the Acknowledger was a single person, his acknowledgement shall be enforced in so far as it is related to him, and that much amount of the debt acknowledged by him shall be deducted from his share in the inheritance. So if the legacy is hundred, and the share of each of the two heirs is fifty, and one of them acknowledges the debt of fifty, while the other heir denies it, the Acknowledgee shall receive twenty-five from the Acknowledger's share. If some of the heirs acknowledge that the deceased had bequeathed so much for a stranger, while the others deny it, it shall be enforced in relation to the share of the Acknowledgers, and not that of those denying it.

كتاب الهبة

وهي تمليك عين مجاناً و من غير عوض، و هذا هو المعنى الأعم منها و أما المصطلح في مقابل أخواتها فيحتاج إلى قيود مخرجة، والامر سهل. و قد يعبّر عنها بالعطية والنحلة، وهي عقد يفتقر إلى إيجاب بكل لفظ دلّ على المقـصـود مـثل «وهبتك» أو «ملكتك» أو «هذالك» و نحو ذلك، و قبول بما دل على الرضا، و لا يعتبر فيه العربية، و الأقوى وقوعها بالمعاطاة بتسليم العين و تسلّمها بعنوانها.

مسألة ١ - يشترط في كل من الواهب و الموهوب له القابل البلوغ و العقل و القصد و الاختيار، نعم يصح قبول الولي عن المولى عليه الموهوب له، و في الموهوب له أن يكون قابلاً لتملك العين الموهوبة، فلا تصح هبة المصحف للكافر، و في الواهب كونه مالكاً لها، فلا تصح هبة مال الغير إلا باذنه أو إجازته، وعدم الحجر عليه بسفه أو فلس، و تصح من المريض بمرض الموت و إن زاد على الثلث.

مسألة ٢ - يشترط في الموهوب أن يكون عيناً، فلا تصح هبة المنافع و أما الدين فان كانت لمن عليه الحقّ صحت بلا إشكال، و يعتبر فيها القبول على الأقوى، و أفادت فائدة الابراء و ليست به، فانها تمليك يحتاج إلى القبول و يترتب عليها السقوط و هو إسقاط لما في الذمة، و إن كانت لغير من عليه الحق

SECTION TWENTY – EIGHT

FREE GIFT (*HIBAH*)

Hibah means giving something in the ownership of another gratis and without anything in exchange. This is its general meaning. But as regards its special technical meaning as against its brotherly terms, it needs some exclusive limitations. It is an easy task. Sometimes it is called "*'Aṭiyyah*" or "*Nahlah*". It is a contract that requires a Declaration in whatever words denoting its purpose, as "I have given you gratis", or "I have given in your ownership" or "This belongs to you," or the like, and an Acceptance carrying the sense of assent. It is not a condition of expressing them in Arabic. According to the stronger opinion, it can also take place by way of *Mu'āṭāt* by delivering the object and taking its delivery as a free gift.

Problem # 1. It is a condition that the donor and the donee accepting it must be adult, sane and having intention and free will. Of course, Acceptance may take place through the guardian of the donee. It is also a condition for the donee that he must be competent to own the object gifted. So it is not permissible to gift a *Muṣḥaf* [i.e., the Qur'ān] to an infidel.

So also it is a condition for the donor that he must be the owner of the object gifted, so that an object belonging to some one else cannot be gifted except with his consent or permission. He must also not be interdicted due to his idiocy or insolvency. A *Hibah* can be made by a sick person during the ailment resulting in his death, even if it exceeds the amount of a third [of his property].

Problem # 2. A subject of *Hibah* must have some external existence. So usufructs cannot be made the subject of *Hibah*. As regards the *Hibah* of a debt, it may be made to a person who is under an obligation, without any hesitation. According to the stronger opinion, it is a condition that there must be Acceptance in it. It has the advantage of exoneration, but it is not exoneration itself. It means giving in the ownership of another requiring an Acceptance.

It also admits of devolution, which means dropping of a liability. If it is made to someone not under an obligation, according to the stronger opinion, it shall be valid in that case too. In such case, its

فالأقوى صحتها أيضاً، و يكون قبض الموهوب بقبض مصداقه.

مسألة ٣ ـ يشترط في صحة الهبة قبض الموهوب له ولو في غير مجلس العقد، و يشترط في صحة القبض كونه باذن الواهب على الأحوط، نعم لو وهب ما كان في يد الموهوب له صح، و لا يحتاج إلى قبض جديد و لا مضي زمان يمكن فيه القبض، و كذا لو كان الواهب ولياً على الموهوب له كالأب والجد للولد الصغير وقد وهبه ما في يده صح، و إن كان الأحوط أن يقصد القبض عنه بعد الهبة، ولو وهبه غير الولي فلابد من القبض، و يتولاه الولي.

مسألة ٤ ـ القبض في الهبة كالقبض في البيع، و هو في غير المنقول كالدار والبستان التخلية برفع يده عنه و رفع المنافيات بحيث يصير تحت استيلائه، و في المنقول الاستيلاء و الاستقلال عليه باليد أوماهوبمنزلته كوضعه في حجره مثلاً.

مسألة ٥ ـ يجوز هبة المشاع لا مكان قبضه ولو بقبض المجموع باذن الشريك أو بتوكيل المتهب إياه في قبض الحصة الموهوبة عنه، بل الظاهر تحقق القبض الذي هو شرط الصحة في المشاع باستيلاء المتهب عليه من دون إذن الشريك أيضاً، و يترتب عليه الأثر و إن كان تعدياً بالنسبة إليه في بعض الصور.

مسألة ٦ ـ لا تعتبر الفورية في القبض و لا كونه في مجلس العقد، فيجوز فيه التراخي عن العقد ولو بزمان كثير، ولو تراخى يحصل الانتقال من حينه، فالنماء السابق على القبض للواهب.

مسألة ٧ ـ لو مات الواهب بعد العقد و قبل القبض بطل العقد و انتقل الموهوب إلى ورثته، و لا يقوم مقامه في الاقباض، و كذا لو مات الموهوب له بطل، و لا يقوم ورثته مقامه في القبض.

مسألة ٨ ـ إذا تمت الهبة بالقبض فان كانت لذي رحم أباً كان أو أماً أو ولداً أو غيرهم لم يكن للواهب الرجوع في هبته، و إن كانت لأجنبي كان له الرجوع فيها ما دامت العين باقية، فان تلفت كلاً أو بعضاً بحيث يصدق معه عدم قيام العين بعينها عرفاً فلا رجوع، و الأقوى أن الزوج والزوجة بحكم

possession shall be established once it is taken into possession.

Problem # 3. It is a condition for the validity of a *Hibah* that the donee must take possession of the subject of *Hibah*, even it is done at a time other than when its contract was concluded. According to the more cautious opinion, it is also a condition the donee must take possession of the subject of *Hibah* with the permission of the donor. Of course, if the donor makes a gift to the donee what is already in the latter's possession, it shall be valid, and there is no need of his taking into possession afresh, nor is there is any need of passage of such time in which it is possible to take possession. Similarly if the donor happens to be the guardian of the donee, as the father or grandfather of a minor child who is given as a gift what is already in his possession, it shall be valid, it is more cautious for him to intend to take into possession after the *Hibah* has been made. If the *Hibah* is done by some one other than the guardian, then it is indispensable to take it into possession, and that can be done by the guardian.

Problem # 4. Taking possession in a *Hibah* is like taking possession in a sale. In case of immobile objects like a house or a garden, it takes place by vacation by taking his hands off from it. In case of mobile objects, a possession takes place by his occupy the object, and having a free hand on it, or what amounts to it, as, for example, putting it under his occupation.

Problem # 5. A joint property may be given as a free gift because it can be occupied whether by occupying the whole with the permission of the partner or by appointing the donee as his agent to occupy the portion gifted. Rather apparently the occupation may take place that a condition for the validity of a joint property by the occupation of the gifted property by the donee even without the permission of the partner. It is quite effective, although in some cases it may be transgression against the partner.

Problem # 6. There is not condition of immediacy in occupation, nor is it to be made at the time of the conclusion of the contract. Delay in occupation after the conclusion of the contract is allowed even for a long time. If a person delays the occupation, the transfer of the gift shall be counted from the time of the occupation. So any growth in the subject of gift in the meantime shall belong to the donor.

Problem # 7. If the donor dies after the conclusion of the contract but before its occupation by the donee, the contract shall be declared null and void, and the gifted object shall be transferred to the heirs of the deceased, and the donee shall not stand in the place of the deceased in its occupation. Similarly, if the donee dies [before occupying the gifted object], the contract shall be declared void, and his heirs shall not stand in his shoes to take its possession.

Problem # 8. If the *Hibah* is finalised through occupation, then if it were in favour of any kindred [*Dhū Raḥim*] like the father, the mother or the son, etc., the donor cannot withdraw the *Hibah*, but if it were in favour of a stranger, he shall have the right of withdrawal as long as the subject of *Hibah* is there. If,

الأجنبي، والأحوط عدم الرجوع في هبتهما للآخر، و كذا لا رجوع إن عوّض المتهب عنها ولو كان يسيراً، من غير فرق بين ما كان إعطاء العوض لأجل اشتراطه في الهبة و بين غيره، بأن أطلق العقد لكن المتهب أثاب الواهب و أعطاه العوض، و كذا لا رجوع فيها لو قصد الواهب فيها القربة الى الله تعالى.

مسألة ٩ - يلحق بالتلف التصرف الناقل كالبيع و الهبة، أو المغيّر للعين بحيث يصدق معه عدم قيام العين بعينها، كالحنطة يطحنها والدقيق يخبزه و الثوب يفصّله أو يصبغه و نحوها، دون غير المغير، كالثوب يلبسه و الفراش يفرشه والدابة يركبها أو يعلفها أو يسقيها و نحوها، و من الأول على الظاهر الامتزاج الرافع للامتياز، و من الثاني قصارة الثوب.

مسألة ١٠ - فيما جاز للواهب الرجوع في هبته لا فرق بين الكل و البعض، فلو وهب شيئين لأجنبي بعقد واحد يجوز له الرجوع في أحدهما بل لو وهبه شيئاً واحداً يجوز له الرجوع في بعضه مشاعاً أو مفروزاً.

مسألة ١١ - الهبة إما معوضة أو غير معوضة، فالمراد بالأولى ما شرط فيها الثواب و العوض وإن لم يعط العوض أو عوّض عنها و إن لم يشترط فيها العوض.

مسألة ١٢ - لو وهب و أطلق لم يلزم على المتهب إعطاء الثواب و العوض، سواء كانت من الأدنى للأعلى أو العكس أو من المساوي للمساوي و إن كان الأولى بل الأحوط في الصورة الأولى إعطاؤه، ولو أعطى العوض لم يجب على الواهب قبوله، و إن قبل و أخذ لزمت الهبة و لم يكن لواحد منهما الرجوع فيما أعطاه.

مسألة ١٣ - لو اشترط الواهب في هبته على المتهب إعطاء العوض بأن يهبه شيئاً مكافأة و ثواباً لهبته و وقع منه القبول على ما اشترط و قبض الموهوب يتخير بين رد الهبة و دفع العوض، و الأحوط دفعه، فان دفع لزمت الهبة الأولى على الواهب، و إلا فله الرجوع فيها.

مسألة ١٤ - لو عين العوض في الهبة المشروط فيها العوض تعين، و يلزم على

however, it is destroyed entirely or partly in a way that it may according to the prevalent custom be considered to be non-existent, he shall forfeit the right of withdrawal. According to the stronger opinion a husband and wife fall under the category of a stranger, though, according to the more cautious opinion, no withdrawal should be made if the *Hibah* is made by one of them in favour of the other. Similarly, there shall be no right of withdrawal if the donee gives something exchange for the gift, even if it were a small thing, regardless whether such a thing in exchange has been stipulated in *Hibah* or not, so that though the *Hibah* was unconditional, the donee gives something to the donor as a reward for his good deed in exchange for the gift. Similarly, there shall be no right of withdrawal if the donor gives the gift with the intention of seeking closeness to Allāh, the Elevated.

Problem # 9. To the category of loss is added the change by transfer, as a sale, or free gift, or changing the object in a way that it may cease to be in its original shape, as wheat after it has been ground into flour, or the flour is baked into bread or a cloth is cut to pieces or dyed, or the like, but not in case it is not changed [altogether], as a garment if it is only put on, a carpet is spread, or one rides a beast of burden or gives it fodder or water, or the like. It shall apparently belong to the first category if the object is so mixed with some other object that it loses its distinction, while it would belong to the second category if it were washed.

Problem # 10. Where the donor is allowed to exercise the right of withdrawing his gift, there is no difference in withdrawing the whole or part thereof. So if a person donates two objects to a stranger by a single contract, he shall have the right to withdraw one of them. Rather, even if he donates a single thing; he shall have the right to withdraw part of it jointly or separately.

Problem # 11. A *Hibah* is with a consideration or without a consideration. The first means a *Hibah* with a condition of a reward for the good deed and a recompense, even if no recompense is paid, while in the second a recompense is paid without there being a stipulation for it.

Problem # 12. If a persons makes a gift without any condition, the donee shall not be bound to pay a reward for the good deed or a return, whether it is some thing higher in return for something inferior, or vice versa, or an equal for an equal, although in the first case it would be preferable, rather more cautious to pay it. If the donees pays a recompense, the donor shall not be bound to accept it. If he accepts it, and receives it, the *Hibah* shall become binding, and neither of them shall have the right to withdraw what they have paid.

Problem # 13. If the donor stipulates in his *Hibah* the payment of something by the donee as a recompense or a reward for the good deed, and the donee happens to accept it and occupies the gifted object. He shall then have the option either to reject the *Hibah* or pay the recompense, though, according to the more cautious opinion, he must pay the recompense. If he pays the recompense, the first *Hibah* shall become binding on the donor; otherwise, he shall have the option [to cancel the *Hibah*].

Problem # 14. If in a conditional *Hibah* the donor specifies the recompense, it shall be final and the donee shall be bound to pay what has been specified if it is supposed that the donee has not returned

المتهب على فرض عدم ردّ أصل الهبة بذل ما عين، ولو أطلق بأن شرط عليه أن يثيب و يعوض و لم يعين العوض فان اتفقا على قدر فذاك و إلا فالأحوط أن يعوض مقدار الموهوب مثلاً أو قيمة، و أحوط منه تعويضه بأكثر خصوصاً إذا كان الواهب أدنى من الموهوب له.

مسألة ١٥ ـ الظاهر أنه لا يعتبر في الهبة المشروط فيها العوض أن يكون التعويض المشروط بعنوان الهبة بأن يشترط على المتهب أن يهبه شيئاً، بل يجوز أن يكون بعنوان الصلح عن شيء بأن يشترط عليه أن يصالحه عن مال أو حق، فاذا صالحه عنه وتحقق منه القبول فقد عوّضه، و لم يكن له الرجوع في هبته، و كذا يجوز أن يكون إبراء من حق أو إيقاع عمل له كخياطة ثوبه أوصياغة خاتمه و نحو ذلك، فاذا أبرأه منه أو عمل له فقد عوّضه.

مسألة ١٦ ـ لو رجع الواهب في هبته فيما جاز له و كان في الموهوب نماء منفصل حدث بعد العقد والقبض كالثمرة والحمل والولد و اللبن في الضرع كان من مال المتهب، ولا يرجع إلى الواهب، بخلاف المتصل كالسمن، فأنه يرجع إليه، و يحتمل أن يكون ذلك مانعاً عن الرجوع، لعدم كون الموهوب معه قائماً بعينه، بل لا يخلو من قوة، بل الظاهر أن حصول الثمرة والحمل والولد أيضاً من ذلك، فلا يجوز معها الرجوع، نعم اللبن في الضرع و أجرة البيت و الحمام سيما أجرة المثل لو غصبها غاصب ليست منه فتكون بعد الرجوع للمتهب.

مسألة ١٧ ـ لو مات الواهب بعد إقباض الموهوب لزمت الهبة و إن كانت لأجنبي و لم تكن معوّضة، و ليس لورثته الرجوع، و كذلك لومات الموهوب له فينتقل الموهوب إلى ورثته انتقالاً لازماً.

مسألة ١٨ ـ لو باع الواهب العين الموهوبة فان كانت الهبة لازمة بأن كانت لذي رحم أو معوضة أو قصد بها القربة أو خرجت العين عن كونها قائمة بعينها يقع البيع فضولياً، فان أجاز المتهب صح، و إن كانت غير لازمة فالظاهر صحة البيع و وقوعه من الواهب و كان رجوعاً في الهبة، هذا إذا كان ملتفتاً إلى هبته.

the gifted object. If it is an unconditional *Hibah*, so that it is stipulated in it that the donor has to pay a reward for the good deed and a recompense, but the recompense is left unspecified, then if both the parties agree as to its amount, well and good; otherwise, it would be more cautious for the donee to pay, for example, an amount equal to gifted object or its price. It is more cautious that the donee should pay something more as a recompense, particularly when the donor happens to be inferior [in status] than the donor.

Problem # 15. Apparently it is not a condition in a *Hibah* with a stipulation of a recompense that the recompense should also be in the form of a gift, so that the donor should stipulate that the donee would pay him something as a free gift. Rather it may be in the form of a compromise on something, so that the donee may him some property or title as a conveyance. If the donee pays him something as a conveyance, and the donor accepts it, then the donee shall be deemed to have paid him the recompense, and the donor shall have no right to withdraw his gift. Similarly, the recompense may be in the form of exoneration from an obligation or the performance of a job as stitching a garment or making a ring for the donor, or the like. Once the donee has exonerated the donee from the obligation or performed the job assigned, he shall be deemed to have paid the recompense [and the donor shall cease to have the right of cancelling the *Hibah*].

Problem # 16. If the donor withdraws his gift as allowed, and some separate growth takes place in the gifted object subsequent to the conclusion of the contract and occupation by the donee, like some fruits, a foetus, an offspring, appearance of milk in the teats [of a cow, etc.], it shall belong to the donee, and shall not return to the donor, contrary to the case of what is inseparable from the gifted object, as fat, that shall be returned to the donor, as there is likelihood of its being an impediment in the donor's right of withdrawal due to the fact that the gifted object has ceased to be what it was. Rather it shall not be free from force. Rather, apparently the appearance of fruits, foetus or offspring should also belong to the same category, so withdrawal shall not be allowed in their case. Of course, the appearance of mil in the teats [of an animal], rent of a house, fee for a public bath, particularly a proper rent or fee in case they have been usurped by a usurper do not belong to that category, and subsequent to the withdrawal, they shall belong to the donee .

Problem # 17. If the donor dies after delivering the donated object, the *Hibah* shall become binding, even if it is made in favour of a stranger, and no recompense has been paid for it, and the heirs shall have no right to withdraw it. Similarly, if the donee dies, [subsequent to the delivery of the gift], the gift shall be transferred to his heirs as an obligatory transfer.

Problem # 18. If the donor sells the donated object, then if the *Hibah* were binding, being in favour of a kindred [*Dhū Raḥim*], or one having a recompense, or in which there is an intention of closeness [to Allāh], or the donated object has ceased to be what it was, the sale shall be declared unauthorized. If it is subsequently assented to by the donee, it shall be valid. If it were not a binding one, then apparently the sale and its execution by the donor shall be valid, and it shall be considered a withdrawal of the *Hibah*. This is the case when he had the *Hibah* in his view; otherwise, there shall be hesitation and

و إلا ففي كونه رجوعاً قهراً تأمل و إشكال فلا يترك الاحتياط.

مسألة ١٩ ـ الرجوع إما بالقول كأن يقول: «رجعت» و ما يفيد معناه، و إما بالفعل كاسترداد العين وأخذها من يد المتهب، و من ذلك بيعها بل و إجارتها و رهنها إن كان بقصد الرجوع.

مسألة ٢٠ ـ لا يشترط في الرجوع اطلاع المتهب، فلوأنشأه من غير اطلاعه صح.

مسألة ٢١ ـ يستحب العطية للأرحام الذين أمر الله تعالى أكيداً بصلتهم و نهى شديداً عن قطيعتهم، فعن مولانا الباقر عليه السلام قال: «في كتاب علي عليه السلام ثلاث خصال لا يموت صاحبهن أبداً حتى يرى و بالهن: البغي و قطعية الرحم و اليمين الكاذبة يبارز الله بها، و إن أعجل الطاعة ثواباً لصلة الرحم، و إن القوم ليكونون فجاراً فيتواصلون فتنمى أموالهم و يثرون، و إن اليمين الكاذبة و قطيعة الرحم لتذران الديار بلاقع من أهلها وتنقلان الرحم، و ان نقل الرحم انقطاع النسل» و أولى بذلك الوالدان اللذان أمر الله تعالى ببرّهما، فعن أبي عبدالله عليه السلام «إن رجلاً أتى النبي صلى الله عليه و آله و قال: أوصني، قال: لا تشرك بالله شيئاً و إن أحرقت بالنار و عذبت إلا و قلبك مطمئن بالايمان، و والديك فأطعهما و برّهما حيين كانا أو ميتين، و إن أمراك أن تخرج من أهلك و مالك فافعل، فان ذلك من الايمان» و أولى من الكل الأم التي يتأكد برّها وصلتها أزيد من الأب، فعن الصادق عليه السلام «جاء رجل إلى النبي صلى الله عليه و آله فقال: يا رسول الله من أبرّ؟ قال: أمك، قال: ثم من؟ قال: أمك، قال ثم من؟ قال: أمك، قال: ثم من؟ قال: أباك» و الأخبار في هذه المعاني كثيرة فلتطلب من مظانها.

مسألة ٢٢ ـ يجوز تفضيل بعض الأولاد على بعض في العطية على كراهية، و ربما يحرم إذا كان سبباً لاثارة الفتنة و الشحناء و البغضاء المؤدية إلى الفساد، كما أنه ربما يرجح فيما إذا يؤمن من الفساد و يكون لبعضهم خصوصية موجبة لأولوية رعايته.

difficulty in considering it an obligatory [or binding] withdrawal, and so caution must not be given up.

Problem # 19. A withdrawal is either in words, as when one says: "I have withdrawn [the *Hibah*] or what carries its sense, or by conduct, as by demanding the donated object back from the donee. To the same category belongs its sale, rather its lease or mortgage, if it were with the intention of withdrawal.

Problem # 20. In a withdrawal it is not a condition to inform the donee. If the donor resorts to it without informing the donee, it shall be valid.

Problem # 21. It is approved to make a donation to the kindred [*Dhawī al-Arḥām*] about whom Allāh, the Exalted has emphatically ordered [the believers] to pay gifts and has extremely forbidden them to break ties with them. So there is a tradition related from our Master, [Imām] al-Bāqir, A.S., saying: " In the book of (Imām) 'Alī, A.S., three traits of character have been mentioned whose possessor shall never die until he has received their evil consequences, namely, Oppression, rupture of relations [i.e., enmity among relatives] and false oath by which one committing it wages war against Allāh. The act of [Allāh's] obedience that invites most immediate reward is the kindness to the relatives. Verily if a group of profligates behave their relations with kindness, their riches abound and their number increases. Certainly false oath and rupture of relations [i.e., enmity among relatives] ruins the towns by evacuation of their dwellers and migration of the relatives. If the relatives migrate, future generation is stopped." The most preferable [for receiving your presents] are the father and mother about whom Allāh has ordered [the believers] to behave with kindness. So it has been reported from (Imām) Abū 'Abdillāh [i.e.,, Imām Ja'far al-Ṣādiq that he has said]: "A man came to the Prophet, Peace be upon him and his Progeny, and said: Give me advice. The Prophet said: Do not make any partner with Allāh, even if you are subjected to be burnt by fire and tormented, your heart must be satisfied with faith. Obey your father and mother, and do good to them, whether they are alive or dead. If your father and mother order you to give up your wife and your belongings, do [as they have ordered you]. This is a part of the faith." The most preferable among all [the relatives] is the mother to whom goodness is to be done emphatically and whose reward is bigger than that of the father. It has been reported from (Imām Ja'far) al-Ṣādiq, A.S.: "A man came to the Prophet, PBUH, and asked: "O Prophet of Allāh, to whom should I do good?" The Prophet replied: "To your mother." He then asked: "Then to whom?" The Prophet replied: "To your mother." Again he asked: "Then to whom?" The Prophet again replied: "To you mother," He again asked: "Then to whom?" The Prophet replied: "To your father." There are numerous reports carrying the same sense, and they can be found in their respective places.

Problem # 22. It is allowed to give preference to some of the children over others in giving presents, though with reluctance. Sometimes they are forbidden when they a source of instigating discord, grudge and enmity leading to wickedness, as sometimes preference is practised where it is safe from [the danger of] rebellion, and some of them possess special qualities that call for giving priority in consideration.

كتاب الوقف واخواته

و هو تحبيس العين و تسبيل المنفعة، و فيه فضل كثير و ثواب جزيل، ففي الصحيح عن أبي عبدالله عليه السلام قال: «ليس يتبع الرجل بعد موته من الأجر إلا ثلاث خصال: صدقة أجراها في حياته فهي تجري بعد موته، و سنة هدى سنّها فهي يعمل بها بعد موته ، و ولد صالح يدعو له» و بمضمونه روايات.

مسألة ١ ـ يعتبر في الوقف الصيغة، وهي كل ما دل على إنشاء المعنى المذكور مثل «وقفت» و «حبست» و «سبلت»، بل و «تصدقت» إذا اقترن به ما يدل على إرادته، كقوله: «صدقة مؤبدة لا تباع و لا توهب» و نحو ذلك، و كذا مثل «جعلت أرضي موقوفة أو محبسة أو مسبلة على كذا» و لا يعتبر فيه العربية و لا الماضوية، بل يكفي الجملة الاسمية، مثل هذا وقف أو هذه محبسة أو مسبلة.

مسألة ٢ ـ لابد في وقف المسجد من قصد عنوان المسجدية، فلو وقف مكاناً على صلاة المصلين و عبادة المسلمين صح لكن لم يصر به مسجداً ما لم يكن المقصود عنوانه، و الظاهر كفاية قوله: «جعلته مسجداً» و إن لم يذكر ما يدل على وقفه و حبسه، و الأحوط أن يقول: وقفته مسجداً أو على أن يكون مسجداً.

مسألة ٣ ـ الظاهر كفاية المعاطاة في مثل المساجد و المقابر و الطرق و الشوارع

SECTION TWENTY-NINE

ENDOWMENT (*WAQF*) & ITS ADJUNCTS

Endowment or *Waqf* is the confinement of an asset and making its usufruct accessible [to the public]. It has great virtue and tremendous reward. It has been reported in an authentic tradition from (Imām) Abū 'Abdillāh (A.S.) that he has said: "No recompense follows a person after his death but due to three moral qualities, namely, the *Ṣadaqah* or charity made during one's lifetime that continues [in the form of its recompense] after his death, a customary precedent of (rightful) guidance put into practice so that it is acted upon even after his death, and virtuous child who prays for him [after his death].

Problem # 1. Pronouncement of the special formula [*Ṣīghah]* is a condition in an Endowment, and that means anything that denotes the initiation in the said sense, as, for example, [saying:] "I have endowed" or "I have confined" or "I have made [the usufruct] accessible [to the public]", rather even saying: "I have given in charity", if it implies his real intention [of endowment], as saying: "It is an everlasting *Ṣadaqah* that can neither be sold nor given as a free gift [*Hibah*], or the like. Similar is the case when he says: "I have made my land endowed, confined, or for public use in such manner..." It is not a condition to make the pronouncement in Arabic, nor in the past tense. Rather it is sufficient to use a nominal clause, as: "This is an endowment", or "This is restricted," or "for public use [only]".

Problem # 2. It is indispensable in an endowment of a mosque that intention of making it a mosque must be there. So if the endower endows a place for the prayers of those Muslims who offer prayers, or worship, it shall be a valid endowment, but it shall not be confined to a mosque, unless he has expressed such intention. Apparently it is sufficient if one says: "I have made it a mosque," even if he has not mentioned anything signifying its endowment or confinement. It is more cautious to say: "I have endowed it for a mosque," or "in order to make it a mosque."

Problem # 3. A *Mu'āṭāt* is sufficient in an endowment for mosques, graveyards, public highways or roads, bridges, caravanserais meant for travellers' stay, or trees planted for the use of the passers-by though their shades and fruits; rather the mats for mosques or lamps for tombs or the like, in short, everything that is confined for public use. So if a person constructs a building and permits the public to offer prayers in it, and some people offer prayers in it, it shall be sufficient for its endowment and turning

و القناطر و الرباطات المعدة لنزول المسافرين و الأشجار المغروسة لانتفاع المارة بظلها أو ثمرها، بل و مثل البواري للمساجد و القناديل للمشاهد و أشباه ذلك، و بالجملة ما كان محبساً على مصلحة عامة، فلو بنى بناء بعنوان المسجدية و أذن في الصلاة فيه للعموم وصلى فيه بعض الناس كفى في وقفه و صيرورته مسجداً، و كذا لو عين قطعة من الأرض لأن تكون مقبرة للمسلمين و خلى بينها و بينهم و أذن إذناً عاماً للدفن فيها فدفنوا فيها بعض الأموات. أو بني قنطرة و خلّى بينها و بين العابرين فشرعوا في العبور عليها، و هكذا.

مسألة ٤ ـ ما ذكرنا من كفاية المعاطاة في المسجد انما هو فيما إذا كان أصل البناء بقصد المسجدية بأن نوى ببنائه و تعميره أن يكون مسجداً خصوصاً إذا حاز أرضاً مباحة لأجل المسجد و بنى فيها بتلك النية، و أما إذا كان له بناء مملوك كدار أو خان فنوى أن يكون مسجداً و صرف الناس بالصلاة فيه من دون إجراء الصيغة عليه يشكل الاكتفاء به، و كذا الحال في مثل الرباط و القنطرة.

مسألة ٥ ـ لا إشكال في جواز التوكيل في الوقف، و في جريان الفضولية فيه خلاف و إشكال لا يبعد جريانها فيه، لكن الأحوط خلافه.

مسألة ٦ ـ الأقوى عدم اعتبار القبول في الوقف على الجهات العامة كالمساجد و المقابر و القناطر و نحوها، و كذا الوقف على العناوين الكلية كالوقف على الفقراء و الفقهاء و نحوهما، و أما الوقف الخاص كالوقف على الذرية فالأحوط اعتباره فيه، فيقبله الموقوف عليهم، و يكفي قبول الموجودين، و لا يحتاج إلى قبول من سيوجد منهم بعد وجوده. و إن كان الموجودون صغاراً أو فيهم صغار قام به وليهم. لكن الأقوى عدم اعتبار القبول في الوقف الخاص أيضاً، كما أن الأحوط رعاية القبول في الوقف العام أيضاً، و القائم به الحاكم أو المنصوب من قبله.

مسألة ٧ ـ الأقوى عدم اعتبار قصد القربة حتى في الوقف العام و إن كان الأحوط اعتباره مطلقا.

it into a mosque. Similar is the case if a person reserves a piece of land for being a graveyard of Muslims and there is no restriction on their use of the land [for that purpose], and gives a general permission for burying the dead, and some of the dead are buried in

it, or constructs a bridge and leaves it open for the passers by so that they start passing from it, and so on.

Problem # 4. The *Mu'ātāt* we have mentioned to be sufficient in [an endowment of] a mosque, it is applicable in case the actual building is intended to be a mosque, so that the person by constructing it intends that it should be a mosque, particularly when he reserves a piece of ownerless land for a mosque, and he constructs with the same intention.

If, however, he has had a building owned by him, as a house or shop, and intends to turn into a mosque, persuades people to offer prayers in it without pronouncing the formula for it, there shall be hesitation in declaring it sufficient.

The same shall be the case with a caravanserai and a bridge.

Problem # 5. There is no objection in the validity of appointing an agent in an endowment. There is, however, some difference and hesitation in an unauthorized endowment [made by an agent].It is not far from being likely to be applicable in it, though contrary to it is more cautious.

Problem # 6. According to the stronger opinion, there is no condition of an Acceptance in an Endowment for public uses as mosques, graveyards, bridges, and the like. Similar is the case with the endowments made in general terms as an endowment for the poor, jurists or the like. But in case of a private endowment, as endowment made in favour of progeny, it is more cautious to make it a condition, so that there should be an Acceptance by those in whose favour the endowment is made.

It is sufficient if Acceptance is made by those who are alive at the time of making the endowment, and it is not necessary to be made by those who come into existence after the endowment is made. If those already in existence are minor or there are some minors among those in whose favour an endowment is made, they shall be represented by their guardian.

According to the stronger opinion, there is no condition of Acceptance even in case of a private endowment, in the same way as it is more cautious to observe the necessity of an Acceptance even in case of a public endowment, where the Acceptance is to be made by the judge or one appointed by him.

Problem # 7. According to the stronger opinion, there is no condition of an endowment to be made with the intention of seeking closeness [to Allāh] even in a public endowment, although it is more cautious to make it a condition in all endowments.

مسألة ٨ ـ يشترط في صحة الوقف القبض، و يعتبر فيه أن يكون باذن الواقف، ففي الوقف الخاص يعتبر قبض الموقوف عليهم، و يكفي قبض الطبقة الأولى عن بقية الطبقات، بل يكفي قبض الموجودين من الطبقة الأولى عمن سيوجد، ولو كان فيهم قاصر قام وليه مقامه، ولو قبض بعض الموجودين دون بعض صح بالنسبة إلى من قبض دون غيره، و أما الوقف على الجهات العامة و المصالح كالمساجد و ما وقف عليها فان جعل الواقف له قيّماً و متولياً اعتبر قبضه أو قبض الحاكم، و الأحوط عدم الاكتفاء بالثاني مع وجود الأول. و مع عدم القيّم تعين الحاكم، و كذا الحال في الوقف على العناو ين الكلية كالفقراء و الطلبة، و هل يكفي قبض بعض أفراد ذلك العنوان بأن يقبض فقير في الوقف على الفقراء مثلاً؟ لعل الأقوى ذلك فيا إذا سلّم الوقف إلى المستحق لاستيفاء ما يستحق، كما إذا سلّم الدار الموقوفة على الفقراء للسكنى إلى فقير فسكنها، أو الدابة الموقوفة على الزوار و الحجاج للركوب إلى زائر و حاج فركبها. نعم لا يكفي مجرد استيفاء المنفعة و الثمرة من دون استيلاء على العين. فاذا وقف بستاناً على الفقراء لا يكفي في القبض إعطاء شيء من ثمرته لبعض الفقراء مع كون البستان تحت يده، بل لا يكفي ذلك في الاعطاء لولي العام أو الخاص أيضاً.

مسألة ٩ ـ لو وقف مسجداً أو مقبرة كفى في القبض صلاة واحدة فيه أو دفن ميت واحد فيها باذن الواقف و بعنوان التسليم و القبض.

مسألة ١٠ ـ لو وقف الأب على أولاده الصغار ما كان تحت يده و كذا كل ولي إذا وقف على المولى عليه ما كان تحت يده لم يحتج إلى قبض حادث جديد، لكن الأحوط أن يقصد كون قبضه عنه، بل لا يخلو من وجه.

مسألة ١١ ـ لو كانت العين الموقوفة بيد الموقوف عليه قبل الوقف بعنوان الوديعة أو العارية مثلاً لم يحتج إلى قبض جديد بأن يستردها ثم يقبضها، نعم لابد أن يكون بقاؤها في يده باذن الواقف. و الأحوط بل الأوجه أن يكون بعنوان الوقفية.

Problem # 8. Occupation is a condition for the validity of an endowment, and it is also a condition that it should be with the permission of the endower. In a private endowment it is a condition that the occupation should be carried out by those in whose favour the endowment has been made. Occupation by their first degree is sufficient on behalf of their remaining degrees. Rather occupation by those already in existence from the first degree is sufficient for those who come into existence later. If there is a minor among them, he shall be represented by his guardian. If some of those in existence take the possession, it shall be valid in relation to themselves but not in relation to the others. As regards a public endowment and that made for public interests, as mosques and what has been endowed for them, if the endower has appointed an administrator or trustee, it shall be a condition that he or the judge should take possession. According to the more cautious opinion occupation by the latter is not sufficient if the former is there. In the absence of an administrator, the judge shall take his place. The same rule shall apply in case of endowments for general purposes, as the endowments for the poor and students. Is the occupation by some of the individuals of the category, as, for example, the occupation by a poor person in case of endowments for the poor sufficient, is a question that is answered in the affirmative according to the stronger opinion in case the endowment is handed over in the possession of a deserving person for utilising it for what he deserves, as when a house meant for the residence of the poor is handed over in the possession of a poor person who uses it for his residence, or a quadruped animal that is endowed for the pilgrims and Ḥājīs for riding is handed over to a pilgrim or a Ḥājī, and he uses it for riding. Of course, mere utilization of an endowed object is not sufficient, but its occupation is also a condition. If a person has endowed a garden for the poor, it is not sufficient for him for satisfying the condition of its occupation to distribute some of its fruits among some poor persons while it remains in his own possession. Rather it is also not sufficient [to give some of its fruits] to the guardian of the public or private endowment.

Problem # 9. If a person has endowed a mosque or graveyard, it shall be sufficient for satisfying the condition of its delivery and occupation if a single person offers prayers in the mosque or if a single dead body is buried in the graveyard with the person of the endower.

Problem # 10. If a father makes an endowment of what is in his possession for his minor children, or a guardian when something already in his possession is made an endowment, a fresh [delivery and] occupation is not required. According to the more cautious opinion it is sufficient that he must have intention of such [delivery and] occupation, and it is not devoid of force.

Problem # 11. If before the endowment the endowed object is already in the possession of the person in whose favour it is endowed, as a trust or an *'Āriyah*, there is no necessity of its fresh [delivery and] occupation so that it is first returned [to the owner] and again taken possession by the person to whom it is endowed. Of course, it is a condition that it should have remained in the possession of the person to whom it is endowed, with the permission of the endower, and according to the more cautious opinion or an opinion more according to the principles of jurisprudence that the permission for retaining it in the latter's possession must have been for the purpose of endowment.

مسألة ١٢ ـ فيما يعتبر أو يكفي قبض المتولي كالوقف على الجهات العامة لو جعل الواقف التولية لنفسه لايحتاج إلى قبض آخر، و يكفي ما هو حاصل، والأحوط بلّ الأوجه أن يقصد قبضه بما أنه متولي الوقف.

مسألة ١٣ ـ لا يشترط في القبض الفورية، فلو وقف عيناً في زمان ثم أقبضها في زمان متأخر كفى، و تم الوقف من حين القبض.

مسألة ١٤ ـ لو مات الواقف قبل القبض بطل الوقف و كان ميراثاً.

مسألة ١٥ ـ يشترط في الوقف الدوام بمعنى عدم توقيته بمدة، فلو قال: «وقفت هذا البستان على الفقراء إلى سنة» بطل وقفاً، و في صحته حبساً أو بطلانه كذلك أيضاً وجهان، نعم لو قصد به الحبس صح.

مسألة ١٦ ـ لو وقف على من ينقرض كما إذا وقف على أولاده و اقتصر على بطن أو بطون ممن ينقرض غالباً و لم يذكر المصرف بعد انقراضهم ففي صحته وقفاً أو حبساً أو بطلانه رأساً أقوال، والأقوى هو الأول، فيصح الوقف المنقطع الآخر بأن يكون وقفاً حقيقة إلى زمان الانقراض و الانقطاع، و ينقضي بعد ذلك و يرجع إلى الواقف أو ورثته، بل خروجه عن ملكه في بعض الصور محل منع.

مسألة ١٧ ـ الظاهر أن الوقف المؤبد يوجب زوال ملك الواقف، و أما الوقف المنقطع الآخر فكونه كذلك محل تأمل، بخلاف الحبس فانه باق معه على ملك الحابس و يورث، و يجوز له التصرفات غير المنافية لاستيفاء المحبس عليه المنفعة إلا التصرفات الناقلة فانها لا تجوز، بل الظاهر عدم جواز رهنه أيضاً، لكن بقاء الملك على ملك الحابس في بعض الصور محل منع.

مسألة ١٨ ـ لو انقرض الموقوف عليه و رجع إلى ورثة الواقف فهل يرجع إلى ورثته حين الموت أو حين الانقراض؟ قولان، أظهرهما الأول و تظهر الثمرة فيما لو وقف على من ينقرض كزيد و أولاده ثم مات الواقف عن ولدين و مات بعده أحد الولدين عن ولد قبل الانقراض ثم انقرض، فعلى الثاني يرجع إلى الولد الباقي، و على الأول يشاركه ابن أخيه.

Problem # 12. In case where the occupation by a trustee is sufficient as in case of endowment for utilisation by the public, if the endower has retained its trusteeship with himself, there shall be no need for a fresh occupation, and its continuance in his possession is sufficient, and according to the more cautious opinion or the opinion based on the principles of jurisprudence is it sufficient for him to have the intention of occupation as the trustee of the endowment.

Problem # 13. There is no condition of immediacy in occupation. So if a person makes endowment of something at one time and gives its possession after some other time, it shall be sufficient, and the endowment shall be considered final from the time of the possession.

Problem # 14. If the endower dies before the [delivery and] possession of the endowed object, the endowment shall be declared void, and it shall become a part of the deceased's inheritance.

Problem # 15. Perpetuity is a condition in endowment in the sense that it should not be meant for a limited time. So if a person says: "I have endowed this garden for the poor for a year', the endowment shall be null and void. There are also two opinions regarding its validity as confinement or voidance as such. Of course, if he intended confinement, it shall be valid.

Problem # 16. If a person endows something in favour of a party that is terminable, as when he endows something in favour of his children, and confines it to one generation or generations that are terminable, but does not mention its use after the termination, there are several opinions regarding its validity as an endowment or confinement or voidance ab initio, while the stronger opinion is in favour of the first alternative [i.e., its validity as an endowment]. So the last interminable endowment shall be valid as an actual endowment until the time of its termination and discontinuance, and subsequently it shall terminate, and shall revert to the endower or his heirs. Rather its cessation from the endower's ownership is forbidden.

Problem # 17. Apparently a perpetual endowment necessitates cessation of the ownership of its endower. But there is hesitation in case of the last interminable endowment being so, contrary to a confinement that remains in the ownership of the confiner and is inherited [by his heirs], and in its case, all types of its utilisation are allowed by the person in favour of whom it is confined except that changes it by transfer that is not permissible. Rather apparently its mortgage is also not permissible, but the continuance of the ownership of the endower is forbidden in some cases.

Problem # 18. After the termination of the purpose for which a thing has been endowed and its reversion to the heirs of the endower, shall it revert to the heirs at the time of the endower's death or the time of termination is a question on which there are two opinions, the one more in conformity with the traditional authority is the former [i.e. from the date of endorser's death]. Its advantage comes to light in case where a person has made a terminable endowment, as an endowment made in favour of Zayd and his children. Then the endower dies leaving two children, and subsequently one of the two children of one of his children dies before the termination, and then the endowment terminates. So, according to the second opinion, it shall revert to the surviving child, while according to the first opinion his brother's child shall share with him.

مسألة ١٩ ـ من الوقف المنقطع الآخر ما كان الوقف مبنياً على الدوام لكن كان على من يصح الوقف عليه في أو له دون آخره، كما إذا وقف على زيد و أولاده و بعد انقراضهم على الكنائس و البيع مثلاً، فيصح بالنسبة إلى من يصح الوقف عليه دون غيره.

مسألة ٢٠ ـ الوقف المنقطع الأول إن كان بجعل الواقف كما إذا وقفه إذا جاء رأس الشهر الكذائي فالأحوط بطلانه، فاذا جاء رأس الشهر المزبور فالأحوط تجديد الصيغة، و لا يترك هذا الاحتياط، و إن كان بحكم الشرع بأن وقف أولاً على ما لا يصح الوقف عليه ثم على غيره فالظاهر صحته بالنسبة إلى من يصح، و كذا في المنقطع الوسط كما إذا كان الموقوف عليه في الوسط غير صالح للوقف عليه بخلافه في الأول و الآخر، فيصح على الظاهر في الطرفين، و الأحوط تجديده عند انقراض الأول في الأول والوسط في الثاني.

مسألة ٢١ ـ لو وقف على جهة أو غيرها و شرط عوده إليه عند حاجته صح على الأقوى، و مرجعه إلى كونه وقفاً مادام لم يحتج إليه، و يدخل في منقطع الآخر، و إذا مات الواقف فان كان بعد طرو الحاجة كان ميراثاً، و إلا بقي على وقفيته.

مسألة ٢٢ ـ يشترط في صحة الوقف التنجيز على الأحوط، فلو علقه على شرط متوقع الحصول كمجيء زيد أو على غير حاصل يقيني الحصول فيما بعد كما إذا قال: «وقفت إذا جاء رأس الشهر» بطل على الأحوط، نعم لا بأس بالتعليق على شيء حاصل سواء علم بحصوله أم لا، كما إذا قال: «وقفت إن كان اليوم جمعة» و كان كذلك.

مسألة ٢٣ ـ لو قال: «هو وقف بعد موتي» فان فهم منه أنه وصية بالوقف صح، و إلا بطل.

مسألة ٢٤ ـ من شرائط صحة الوقف إخراج نفسه عنه، فلو وقف على نفسه لم يصح، ولو وقف على نفسه و غيره فان كان بنحو التشريك بطل بالنسبة الى

Problem # 19. In case of a perpetual endowment, if its first part is valid, but not its last one, it shall be treated as a terminable one, as when a person endows it in favour of Zayd and his children and then after their termination it is endowed, for example, in favour of places of worships of the Christians and Jews, then it shall be valid in relation to those it can lawfully be endowed, and invalid in relation to the others.

Problem # 20. In case of an endowment whose first part is terminable, if it were made by the endower himself, as when he endows it from the beginning of such month, according to the more cautious opinion, it shall be void, so that when the beginning of that month arrives, its formula must be pronounced afresh, and this caution must not be given up. If an endowment is made according to the *Shari'ah*, so that he endows its first part in favour of those not permissible by law and then in favour of those permissible by law, then apparently it shall be valid in relation to those permissible by law. The same rule shall apply to a terminable endowment whose middle one is not permissible, while the first and the last are permissible, it shall be valid in respect of the first and the last. To be more cautious it must be renewed after the termination of the first and the middle.

Problem # 21. If a person endows something for one purpose or the other, and stipulates that it shall revert to himself in case he needs it, according to the stronger opinion, it shall be valid, and it shall be treated as an endowment as long as he not need its reversion, and shall belong to the category of endowments whose last part is terminable. If the endower dies, if it were after the occurrence of his need, it shall be a part of his inheritance; otherwise, it shall continue to be an endowment.

Problem # 22. It is a condition for the validity of an endowment that it should not be contingent on any thing. If a person endows something as contingent one something that is likely to happen as arrival of Zayd, or something that does not exist at that time but it shall certainly occur later, as when he says: "I have endowed it on the arrival of the first of the month", according to the more cautious opinion, it shall be void. Of course, there is no objection if it is made contingent on something that already exists, regardless of his knowledge or ignorance about it, as when he says: "I have endowed it if it is Friday to-day,' and it was Friday.

Problem # 23. If a person says: "It is endowed after my death.' If it is understood to be a will, it shall be valid; otherwise, not valid.

Problem # 24. One of the conditions of the validity of an endowment is the exclusion of the endower from it, so that if he endows it in his own favour, it shall not be valid. If he endows something in favour of himself and another person, as a partnership, it shall be invalid as far as it relates to himself but not as far it relates to the other. If it is made in sequence, so that he endows something in his own favour and then in favour of another, then it shall be treated as an endowment whose first part is terminable. If it

نفسه دون غيره، و إن كان بنحو الترتيب فان وقف على نفسه ثم على غيره فمن منقطع الأول، و ان كان بالعكس فمنقطع الآخر، و ان كان على غيره ثم نفسه ثم غيره فمنقطع الوسط، وقد مر حكم الصور.

مسألة ٢٥ ـ لو وقف على غيره كأولاده أو الفقراء مثلاً و شرط أن يقضي ديونه أو يؤدي ما عليه من الحقوق المالية كالزكاة و الخمس أو ينفق عليه من غلة الوقف لم يصح، و بطل الوقف من غير فرق بين مالو أطلق الدين أو عيّن، و كذا بين أن يكون الشرط الانفاق عليه و إدرار مؤونته إلى آخر عمره أو إلى مدة معينة، و كذا بين تعيين المؤونة و عدمه، هذا كله إن رجع الشرط الى الوقف لنفسه، و أما إن رجع الى الشرط على الموقوف عليهم بأن يؤدوا ما عليه أو ينفقوا عليه من منافع الوقف التي صارت ملكاً لهم فالأقوى صحته، كما أن الأقوى صحة استثناء مقدار ما عليه من منافع الوقف، ثم إن في صورة بطلان الشرط تختلف الصور، ففي بعضها يمكن أن يقال بالصحة بالنسبة الى ما يصح كما لو شرك نفسه مع غيره، وفي بعضها يصير من قبيل منقطع الأول، فيصح على الظاهر فيما بعده، لكن الاحتياط باجراء الصيغة في مواردها لا ينبغي تركه.

مسألة ٢٦ ـ لو شرط أكل أضيافه و من يمر عليه من ثمرة الوقف جاز، و كذا لو شرط إدرار مؤونة أهله و عياله و إن كان ممن يجب نفقته عليه حتى الزوجة الدائمة إذا لم يكن بعنوان النفقة الواجبة عليه حتى تسقط عنه و إلا رجع الى الوقف على النفس.

مسألة ٢٧ ـ لو آجر عيناً ثم وقفها صح الوقف، و بقيت الاجارة على حالها، و كان الوقف مسلوب المنفعة في مدة الاجارة، فان انفسخت بالفسخ أو الاقالة بعد تمامية الوقف رجعت المنفعة الى الواقف المؤجر دون الموقوف عليهم.

مسألة ٢٨ ـ لا إشكال في جواز انتفاع الواقف بالأوقاف على الجهات العامة، كالمساجد و المدارس و القناطر و الخانات المعدة لنزول المسافرين و نحوها، و أما الوقف على العناوين العامة كفقراء المحل مثلاً إذا كان الواقف

were otherwise, then it shall be treated as an endowment whose last part is terminable. If it were in favour of a stranger and then in favour of himself and then again in favour of another, then it shall be treated as an endowment whose middle is terminable. It various categories have already been mentioned.

Problem # 25. If a person endows something in favour of another, as, for example, his children or the poor, and stipulates his debts must be paid or payment of his obligatory liabilities should be made as Zakāt, Khums, or he should be maintained out of the grain of the endowment, it shall not be a valid endowment, and the endowment shall be declared void without any difference whether he specifies the debts or leaves them unspecified, and whether his maintenance and payment of his expenses are to be made continously till the end of his life or up to a definite time, and whether the amount of expenses is specified or not. All these cases relate to the condition when he endows something in his own favour. If, however, the condition relates to others in whose favour he has made the endowment to the effect that they must defray his debts or expend on him out of the utilities of the endowment that have turned their property, then, according to the stronger opinion, it shall be valid, in the same way as, according to the stronger opinion, it is also valid to exclude from the utilities of the endowment up to the amount of repayment of his dues. Then in case of the invalidity of the endowment, the cases differ, so that in some of the cases it may be declared valid in relation to what is lawful, as when he makes himself a partner with another, and in some it becomes one whose first part is terminable, and apparently what follows it is valid, though by way of caution in such cases the formula must be pronounced again and its caution must not be given up.

Problem # 26. If a person stipulates that his guests and those who pass by may eat the fruits of the endowment, it shall be permissible. If he stipulates continuous defraying the expenses of his wife and children, even if they were those whom he is obliged to maintain, including even his permanent wife, provided it is not in the form of maintenance obligatory on him so that he may be relieved of it; otherwise, it shall turn into an endowment in favour of himself.

Problem # 27. If a person rents out a real estate, and then endows it, it shall be valid, and the lease shall remain intact and the endowment shall be deprived of the benefit until the expiry of the lease. If the lease is revoked or cancelled by mutual consent [*Iqālah*] after the expiry of the endowment, its benefit shall return to the lessor endowing it and not to those to whom it is endowed.

Problem # 28. There is no object in the legality of the utilisation by the endower of the endowments made for public use as mosques, schools, bridges, caravanserais prepared for the travellers to stay, or the like. As regards the endowments made for the public in general as, for example, the poor of the locality, if at the time of making the endowment, the endower is included in those for whom it is intended or is included in them later, then if his intention is the distribution of the utilities, then there is no

داخلاً في العنوان حين الوقف أو صار داخلاً فيه فيما بعد فان كان المراد التوزيع عليهم فلا إشكال في عدم جواز أخذ حصته من المنافع، بل يلزم أن يقصد من العنوان المذكور حين الوقف من عدا نفسه و يقصد خروجه عنه، و من ذلك ما لو وقف شيئاً على ذرية أبيه أو جده إن كان المقصود البسط و التوزيع كما هو الشائع المتعارف فيه، و إن كان المراد بيان المصرف كما هو الغالب المتعارف في الوقف على الفقراء و الزوار والحجاج و نحو هم فلا إشكال في خروجه و عدم جواز الانتفاع به إذا قصد خروجه، و أما لو قصد الاطلاق و العموم بحيث يشمل نفسه فالأقوى جواز الانتفاع، و الأحوط خلافه، بل يكفي في جوازه عدم قصد الخروج، و هو أولى به ممن قصد الدخول.

مسألة ٢٩ ـ يعتبر في الواقف البلوغ و العقل و الاختيار و عدم الحجر لفلس أو سفه، فلا يصح وقف الصبي وإن بلغ عشراً على الأقوى، نعم حيث ان الأقوى صحة وصية من بلغه كما يأتي فان أوصى به صح وقف الوصي عنه.

مسألة ٣٠ ـ لا يعتبر في الواقف أن يكون مسلماً، فيصح وقف الكافر فيما يصح من المسلم على الأقوى، وفيما يصح منه على مذهبه إقراراً له على مذهبه.

مسألة ٣١ ـ يعتبر في الموقوف أن يكون عيناً مملوكة يصح الانتفاع به منفعة محللة مع بقاء عينه بقاء معتداً به غير متعلق لحق الغير المانع من التصرف و يمكن قبضه، فلا يصح وقف المنافع، ولاالديون، ولا ما لا يملك مطلقا كالحر، أو لا يملكه المسلم كالخنزير، و لا ما لا انتفاع به إلا باتلافه كالأطعمة و الفواكه، و لا ما انحصر انتفاعه المقصود في المحرم كآلات اللهو والقمار، و يلحق به ما كانت المنفعة المقصودة من الوقف محرمة، كما إذا وقف الدابة لحمل الخمر أو الدكان لحرزها أو بيعها، و كذا لا يصح وقف ريحانة للشم على الأصح، لعدم الاعتداد ببقائها، و لا العين المرهونة، و لا ما لا يمكن قبضه كالدابة الشاردة، و يصح وقف كل ما صح الانتفاع به مع بقاء عينه بالشرائط، كالأراضي والدور و العقار و الثياب و السلاح و الآلات المباحة و الأشجار و المصاحف و الكتب

hesitation in the non-permissibility of his drawing his

share out of the utilities; rather, he is bound to intend those enjoying the utilities to be other than himself, by excluding himself from their list. Similar is the case when he endows something for the progeny of his father or grandfather, if he intends extension and distribution, as is generally prevalent. If he intends its expenditure, as is usual in endowments, on the poor, pilgrims and Hājīs or the like, he shall be excluded from them and non-permissibility of his utilisation, if he has so intended. If, however, he has intended its utilisation in general without any restriction in a way that it may also include him, then, according to the stronger opinion it shall be permissible to enjoy the utilities, though, to be more cautious, it is otherwise. Rather the absence of intention of exclusion is sufficient for its permissibility, and so he is to be preferred to be one of those intended to be included [in the list of the beneficiaries].

Problem # 29. It is a condition in the endower that he must be adult, sane, having free will and free from interdiction due to insolvency or idiocy, so that an endowment made by a minor is not valid, even if, according to the stronger opinion, he has attained ten years of age. Of course, as, according to the stronger opinion, a will made by a minor who has attained such age [i.e., ten years is valid, the details of which shall follow [in its relevant Chapter], so if he makes a will for endowment, the endowment made by the executor on his behalf shall be valid.

Problem # 30. It is not a condition for an endower to be a Muslim. So,-according to a stronger opinion, an endowment made by an infidel in respect of what it is lawful for a Muslim shall be valid. Similarly, it shall be valid in respect of what his faith recognizes it to be lawful.

Problem # 31. It is a condition in the object endowed that it must be it must be something that can be owned and it must be something that can utilised lawfully as long it exists in a considerable way, no other person must have a title to it in a way that it may obstruct its utilisation, and it must be capable of being possessed.

So the endowment of benefits is not valid nor of debts, nor of what cannot be owned absolutely as a free person, or what cannot be owned by a Muslim as a pig, or what cannot be utilised except by consuming it as foodstuffs or fruits, of what cannot be utilised except for purposes that are forbidden as the instruments of entertainment and gambling, and to this is affiliated the utilisation intended by the endowment that is forbidden as endowing a beast of burden for carrying wine or a shop for storing or selling it.

Likewise, according to the most authentic opinion, it is not valid to endow a flower for smelling as usually it does not last. Nor is it valid to endow a mortgaged object, or what cannot be occupied as a bolting horse.

و الحلي و صنوف الحيوان حتى الكلب المملوك و السنور و نحوها.

مسألة ٣٢ ـ لا يعتبر في العين الموقوفة كونها مما ينتفع بها فعلاً، بل يكفي كونها معرضاً للانتفاع ولو بعد مدة، فيصح وقف الدابة الصغيرة و الأصول المغروسة التي لا تثمر إلا بعد سنين.

مسألة ٣٣ ـ المنفعة المقصودة في الوقف أعم من المنفعة المقصودة في العارية و الاجارة، فتشمل النماءات والثمرات،فيصح وقف الأشجار لثمرها و الشاة لصوفها و لبنها و نتاجها.

مسألة ٣٤ ـ ينقسم الوقف باعتبار الموقوف عليه على قسمين: الوقف الخاص، و هو ما كان وقفاً على شخص أو أشخاص، كالوقف على أولاده و ذريته أو على زيد و ذريته، و الوقف العام، و هو ما كان على جهة و مصلحة عامة كالمساجد و القناطر والخانات أو على عنوان عام كالفقراء والأيتام ونحوهما.

مسألة ٣٥ ـ يعتبر في الوقف الخاص وجود الموقوف عليه حين الوقف، فلا يصح الوقف ابتداءً على المعدوم، و من سيوجد بعدُ، و كذا الحمل قبل أن يولد، و المراد بكونه ابتداءً أن يكون هو الطبقة الأولى من دون مشاركة موجود في تلك الطبقة، فلو وقف على المعدوم أو الحمل تبعاً للموجود بأن يجعل طبقة ثانية أو مساوياً للموجود في الطبقة بحيث شاركه عند وجوده صح بلا إشكال، كما إذا وقف على أولاده الموجودين و من سيولد له على التشريك أو الترتيب، بل لا يلزم أن يكون في كل زمان وجود الموقوف عليه و ولادته، فلو وقف على ولده الموجود و على ولد ولده بعده و مات الولد قبل ولادة ولده فالظاهر صحته، و يكون الموقوف عليه بعد موته الحمل، فما لا يصح الوقف عليه هو المعدوم أو الحمل ابتداءً بنحو الاستقلال لا التبعية.

مسألة ٣٦ ـ لا يعتبر في الوقف على العنوان العام وجود مصداقه في كل زمان، بل يكفي إمكان وجوده مع وجوده فعلاً في بعض الأزمان فلو وقف بستاناً مثلاً على فقراء البلد و لم يكن في زمان الوقف فقير فيه لكن سيوجد صح الوقف، و لم

It is valid to endow every thing that can be lawfully utilised in a way that it may continue to exist with all its conditions, as lands, mansions, farms, garments, arms, lawful instruments, trees, copies of Qur'ān, books, ornaments, kinds of animals, including a pet dog or cat, or the like.

Problem # 32. It is not a condition for an endowed object that it must be something that can be utilised presently. Rather it is sufficient if it can be utilised even though after some time. So an endowment of a minor best of burden is valid, or the saplings of a tree for plantation even if it should bear fruits after a few years.

Problem # 33. The utilisation intended in an endowment is more extensive than the utilisation intended in *'Āriyah* or Lease, so that it includes growth and fruits. So an endowment of trees for their fruits or of sheep for their wool, milk and offspring is valid.

Problem # 34. An endowment is of two kinds as regards the donee. It is a Private Endowment when it is endowed in favour of an individual or individuals when it is made in favour of one's children or progeny, or in favour of Zayd or his progeny; and it is a Public Endowment when it is endowed for a general and public use, mosques, bridges, inns, or with a general connotation, as the poor or the orphans, or the like.

Problem # 35. In a Private Endowment the existence of the donee is a condition at the time of making the endowment. So an endowment in favour of someone that initially does not exist is not valid and who should come to exist later. Similar is the case of an embryo before it is born. By being initially in existence means that the donee must belong to the class first without having any existing partner of that class.

If a person makes an endowment in favour of a non-existent person or an embryo as subordinate to the existing one, placing it in the second class or equal to the existing one, so that it should share the existing ones at the time it comes to existence, it shall be valid without any objection, as when a person makes an endowment in favour of his existing children as well as one born to him later jointly or separately.

Rather the existence of the donee and his birth are also not indispensable at all times. So if a person makes an endowment in favour of his existing child and his subsequent grandchild[ren], and the former child dies before the birth of his own child, then apparently it shall be valid, and after the death of that child the embryo shall be the donee. Thus an endowment that is not valid is the one made in favour of a non-existent person or an embryo initially in an independent position and not as subordinate to the existing one.

Problem # 36. In a Public Endowment the existence of the donee at all times is not a condition. Rather it is sufficient if it exists at one time [and does not exist at another]. So if a person makes an

يكن من منقطع الأول، كما أنه مع فقده بعد وجوده لم يكن منقطع الوسط بل هو باقٍ على وقفيته، فيحفظ غلته إلى أن يوجد.

مسألة ٣٧ ـ يشترط في الموقوف عليه التعيين، فلو وقف على أحد الشخصين أو أحد المسجدين لم يصح.

مسألة ٣٨ ـ الظاهر صحة الوقف على الذمي و المرتد لا عن فطرة سيما إذا كان رحماً، و أما الكافر الحربي و المرتد عن فطرة فمحل تأمل.

مسألة ٣٩ ـ لا يصح الوقف على الجهات المحرمة و ما فيه إعانة على المعصية، كمعونة الزنا و قطع الطريق و كتابة كتب الضلال،و كالوقف على البيع و الكنائس و بيوت النيران لجهة عمارتها و خدمتها و فرشها و معلقاتها و غيرها، نعم يصح وقف الكافر عليها.

مسألة ٤٠ ـ لو وقف مسلم على الفقراء أو فقراء البلد انصرف إلى فقراء المسلمين، بل الظاهر أنه لو كان الواقف شيعياً انصرف إلى فقراء الشيعة، ولو وقف كافر على الفقراء انصرف إلى فقراء نحلته، فاليهود إلى اليهود، و النصارى إلى النصارى و هكذا، بل الظاهر أنه لو كان الواقف مخالفاً انصرف إلى فقراء أهل السنة، نعم الظاهر أنه لا يختص بمن يوافقه في المذهب، فلا انصراف لو وقف الحنفي إلى الحنفي و الشافعي إلى الشافعي و هكذا.

مسألة ٤١ ـ لو كان أفراد عنوان الموقوف عليه منحصرة في أفراد محصورة معدودة، كما لو وقف على فقراء محلة أو قرية صغيرة توزع منافع الوقف على الجميع، و إن كانوا غير محصورين لم يجب الاستيعاب، لكن لا يترك الاحتياط بمراعاة الاستيعاب العرفي مع كثرة المنفعة، فتوزع على جماعة معتد بها بحسب مقدار المنفعة.

مسألة ٤٢ ـ لو وقف على فقراء قبيلة كبني فلان و كانوا متفرقين لم يقتصر على الحاضرين، بل يجب تتبع الغائبين و حفظ حصتهم للايصال إليهم، ولو صعب إحصاؤهم يجب الاستقصاء بمقدار الامكان و عدم الحرج على الأحوط،

endowment, for example, of a garden in favour of the poor of the town, and there were no poor in the town at the time of making the endowment, but they may be there later, the endowment shall be valid, and shall not be one whose first part is disrupted, in the same way as when the donee of an endowment after once having been existent becomes extinct shall not be considered to be one disrupted in the middle; rather, it shall continue to be an endowment, and its grain shall be preserved as long as any poor is found.

Problem # 37. It is a condition that the donee must be specified; so that if a person specifies the endowment to be in favour of one of the two persons or one of the two mosques, it shall not be valid.

Problem # 38. Apparently an endowment made in favour of a *Dhimmī* (or a non-Muslim subject of a Muslim State) or an apostate who is not one born of Muslim parents, particularly when he or she were a kindred, is valid. There is, however, hesitation in the validity of an endowment made in favour of an infidel at war or an apostate born of Muslim parents.

Problem # 39. An endowment is not valid for forbidden purposes and for what therein lies an assistance for sinful acts, as assistance to fornication, highway robbery and writing misguiding books, or an endowment for the idol temples, churches, synagogues and fire-temples in order to build, serve, carpet and decorate them, etc. Of course, an endowment of an infidel for such purposes is valid.

Problem # 40. If a Muslim makes an endowment for the poor or the poor of the town, it shall relate to the poor Muslims. Rather apparently if it was made by a Shī'ah, it shall relate to the poor of the Shī'ah community. If it was made by an infidel it shall relate to the poor of his community, so that an endowment by a Jew shall relate to the Jews, an endowment by a Christian to Christians, and so on. Rather apparently if it was made one opposed to the Shī'ahs, it shall relate to the poor among the Sunnī community. Of course, apparently it shall not be confined to those who agree with the donor's school of jurisprudence, so that it shall not be confined to Ḥanafīs only if it is made by a Ḥanafī, or to a Shāfi'ī if it is made by a Shafi'ī , and so on.

Problem # 41. If the persons in whose favour an acknowledgement is made are a few individuals in a limited number, as an endowment made in favour of the poor of a locality or a small village, the benefits of the endowment shall be distributed among all of them. If they are not specified, the distribution shall not be general, but in case the benefits are in a large amount, caution must not be given up by following the prevailing system of general distribution, so that the distribution shall take place among a considerable group according keeping in view the amount of the benefits.

Problem # 42. If a person makes an endowment in favour of the poor of a tribe, as such and such tribe, and they happen to be scattered in different places, the distribution shall not be confined to those available, but it shall be obligatory to make a search for those who are absent, and their share shall be

نعم لو كان عدد فقراء القبيلة غير محصور كبني هاشم جاز الاقتصار على الحاضرين، كما أن الوقف لو كان على الجهة جاز اختصاص الحاضرين به، ولا يجب الاستقصاء.

مسألة ٤٣ ـ لو وقف على المسلمين كان لمن أقر بالشهادتين إذا كان الواقف ممن يرى أن غير أهل مذهبه أيضاً من المسلمين، ولو وقف الامامي على المؤمنين اختص بالا ثني عشرية، و كذا لو وقف على الشيعة.

مسألة ٤٤ ـ لو وقف في سبيل الله يصرف في كل ما يكون وصلة إلى الثواب، و كذلك لو وقف في وجوه البرّ.

مسألة ٤٥ ـ لو وقف على أرحامه أو أقاربه فالمرجع العرف، ولو وقف على الأقرب فالأقرب كان ترتيبياً على كيفية طبقات الارث.

مسألة ٤٦ ـ لو وقف على أولاده اشترك الذكر و الأنثى و الخنثى و يقسم بينهم على السواء، ولو وقف على أولاد أولاده عمّ أولاد البنين و البنات ذكورهم و إناثهم بالسوية.

مسألة ٤٧ ـ لو قال: «وقفت على ذريتي» عمّ البنين و البنات و أولادهم بلا واسطة و معها ذكوراً و إناثاً، و تشارك الطبقات اللاحقة مع السابقة، و يكون على الرؤوس بالسوية، و كذا لو قال: «وقفت على أولادي و أولاد أولادي» فان الظاهر منهما التعميم لجميع الطبقات أيضاً، نعم لو قال: «وقفت على أولادي ثم على الفقراء» أو قال: «وقفت على أولادي و أولاد أولادي ثم على الفقراء» فلا يبعد أن يختص بالبطن الأول في الأول و بالبطنين في الثاني خصوصاً في الصورة الأولى.

مسألة ٤٨ ـ لو قال: «وقفت على أولادي نسلاً بعد نسل و بطناً بعد بطن» فالظاهر المتبادر منه عرفاً أنه وقف ترتيب، فلا يشارك الولد أباه و لا ابن الأخ عمه.

مسألة ٤٩ ـ لو علم من الخارج وقفية شيء على الذرية و لم يعلم أنه وقف

kept in reserve for conveying it to them. If it is difficult to search them, according to the more cautious opinion, the search shall be made as far as possible and to the extent that it does not involve any distress. Of course, if the number of the poor of the tribe is unlimited, as Banū Hāshim, the distribution may be confined to those who are available, as is the case when an endowment is made for a particular purpose, it may be confined to those available, and it is not obligatory to make a search [for the deserving].

Problem # 43. If a person makes an endowment for Muslims, it shall be meant for those who pronounce the two formulas of testimony,[namely declarations testifying the Unity of Allah and the prophethood of Prophet Muḥammad, PBUH], when the donor belongs to those who believe that the followers of sects other than his own are also Muslims.

If, however, a follower of the Imāmī sect makes an endowment in favour of *Mu'mins* [a term used by the Shī'ahs for the followers of the Shī'ah faith], it is be exclusively meant for the followers of the *Ithnā 'Asharī* school. Same is the case if a person makes an endowment in favour of the Shī'ahs.

Problem # 44. If a person makes an endowment in the way of Allāh, it may be spent in any thing that brings divine reward. The same is the case if it is made for virtuous purposes.

Problem # 45. If a person makes an endowment in favour of his kindred or close relatives, action shall be taken according to the prevalent usage. If he has made it in favour of the closer relatives to precede the remoter ones, it shall mean observation of the order of the classes of relatives.

Problem # 46. If a person makes an endowment in favour of his children, it shall mean to include the males, females and the hermaphrodites and shall be divisible among them equally. If he makes it in favour of his grandchildren, it shall apply generally to the male and female children of his sons and daughters and shall be divisible equally [among them].

Problem # 47. If a person says: "I have endowed it for my progeny", it shall apply generally to his sons and daughters and their direct or indirect children, both males and females, the preceding classes sharing with the succeeding ones, and it shall be divisible per head equally. Likewise, if a person says: "I have endowed it for my children and grandchildren", it shall apparently mean to apply to all the classes of his children.

Of course, if he says: "I have endowed it to my children and then to the poor", or "I have endowed it for my children and grandchildren, and then the poor", it is not far from being exclusively meant for the first generation in the first case and the two generations in the second case, particularly in the first case.

Problem # 48. If a person says: "I have endowed it for my children, generation after generation", apparently according to the usual sense it shall mean that he has intended succession in order, so that the son is not to share with his father nor the nephew with his uncle.

Problem # 49. If it is known outwardly that an endowment is in favour of the [donor's] progeny, it is not known whether it means that all the members of the progeny are to share with other one another or the order of their succession is to be observed, apparently, with the exception of the class first, division shall be made by casting lots.

تشريك أو ترتيب فالظاهر فيما عدا قسمة الطبقة الأولى الرجوع إلى القرعة.

مسألة ٥٠ ـ لو قال: «وقفتُ على أولادي الذكور نسلاً بعد نسل» يختص بالذكور من الذكور في جميع الطبقات، و لا يشمل الذكور من الاناث.

مسألة ٥١ ـ لو كان الوقف ترتيبياً كانت الكيفية تابعة لجعل الواقف فتارة جعل الترتيب بين الطبقة السابقة و اللاحقة و يراعى الأقرب فالأقرب إلى الواقف، فلا يشارك الولد أباه، و لا ابن الأخ عمه و عمته، و لا ابن الأخت خاله و خالته، و أخرى جعل الترتيب بين خصوص الآباء من كل طبقة و أبنائهم، فاذا كانت إخوة و لبعضهم أولاد لم يكن للأولاد شيء ما دام حياة الآباء، فاذا توفي الآباء شارك الأولاد أعمامهم، و له أن يجعل الترتيب على أي نحو شاء و يتبع.

مسألة ٥٢ ـ لو قال: «وقفت على أولادي طبقة بعد طبقة» فاذا مات أحدهم و كان له ولد فنصيبه لولده، ولو مات أحدهم و له ولد يكون نصيبه له، ولو تعدد الولد يقسم نصيبه بينهم على الرؤوس، و إذا مات من لا ولد له فنصيبه لمن كان في طبقته، و لا يشاركهم الولد الذي أخذ نصيب والده.

مسألة ٥٣ ـ لو وقف على العلماء انصرف إلى علماء الشريعة، فلا يشمل غيرهم كعلماء الطب و النجوم و الحكمة.

مسألة ٥٤ ـ لو وقف على أهل مشهد كالنجف مثلاً اختص بالمتوطنين و المجاورين، و لا يشمل الزوار و المترددين.

مسألة ٥٥ ـ لو وقف على المشتغلين في النجف مثلاً من أهل بلد كطهران أو غيره اختص بمن هاجر من بلده اليه للاشتغال، و لا يشمل من جعله وطناً له معرضاً عن بلده.

مسألة ٥٦ ـ لو وقف على مسجد فمع الاطلاق صرفت منافعه في تعميره وضوئه و فرشه و خادمه، ولو زاد شيء يعطى لامامه.

مسألة ٥٧ ـ لو وقف على مشهد يصرف في تعميره وضوئه و خدامه المواظبين

Problem # 50. If a person says: "I have endowed it in favour of my male children generation after generation", the endowment shall be meant for all the classes of the males, and none of the males of the female children.

Problem # 51. If an endowment is made to follow a particular order, the manner shall be followed according to what has been prescribed by the endower, so that sometimes the order to be followed is between the preceding and the succeeding ones, and the closer ones shall be preferred to the remoter ones, and the sons shall not share with their fathers, nor the nephews with the paternal uncles and aunts, nor sons of the sisters with maternal uncles or aunts. The other order may be particularly between fathers of each class and their sons, so that when there are brethren and children of some of them, the children shall not get anything as long as the fathers are alive. When the fathers are dead, the children shall share with their paternal uncles. It is up to the endower to prescribe an order in whatever manner he likes and that shall be followed.

Problem # 52. If a person says: "I have endowed to my children class after class", then if any of them dies leaving a child behind, his share shall go to his child; and if any of them dies, his share shall go to his child. In case there are several children, his share shall be divided among them per head. If a person dies leaving no children, his share shall go to those belonging to his class, but a child who has taken the share of his father shall not share with them.

Problem # 53. If a person has made an endowment in favour of scholars it shall be meant exclusively for the religious scholars, and no other scholars as the scholars of pharmacology, astronomy and philosophy (or rational sciences) shall be included among them.

Problem # 54. If a person makes an endowment in favour of those belonging to the holy places, it shall be meant exclusively for the citizens and keepers of the shrines of those places, and shall not include the pilgrims and visitors.

Problem # 55. If a person makes an endowment in favour of those working, for example, in Najaf, or the inhabitants, for example, of Tehran or any other town, it shall be meant exclusively for those who have migrated from their cities to the said towns for work, and shall not include those who have made the said towns their hometowns leaving their own hometowns.

Problem # 56. If a person makes an endowment for a mosque, then if it were in general terms, its benefits shall be spent on its construction and repairs, lighting, carpeting and servants, and if there is some surplus, it shall be given to its *Imām*, or the person leading prayers in it.

Problem # 57. If a person makes an endowment for a holy shrine, it shall be spent on its construction and repair, lighting and servants looking after some of its necessary affairs.

لبعض الأشغال اللازمة المتعلقة به.

مسألة ٥٨ ـ لو وقف على سيدالشهداء عليه السلام يصرف في إقامة تعزيته من أجرة القاريء و ما يتعارف صرفه في المجلس للمستمعين و غيرهم.

مسألة ٥٩ ـ لا إشكال في أنه بعد تمامية الوقف ليس للواقف التغيير في الموقوف عليه باخراج بعض من كان داخلاً أو إدخال من كان خارجاً إذا لم يشترط ذلك في ضمن عقد الوقف، و هل يصح ذلك إذا شرطه؟ لا يبعد عدم الجواز مطلقا لا إدخالاً و لا إخراجاً، فلو شرط ذلك بطل شرطه بل الوقف على إشكال، و مثل ذلك لو شرط نقل الوقف من الموقوف عليهم إلى من سيوجد، نعم لو وقف على جماعة إلى أن يوجد من سيوجد و بعد ذلك كان الوقف على من سيوجد صح بلا إشكال.

مسألة ٦٠ ـ لو علم وقفية شيء و لم يعلم مصرفه ولو من جهة نسيانه فان كانت المحتملات متصادقة غير متباينة يصرف في المتيقن، كما إذا لم يدر أنه وقف على الفقراء أو الفقهاء فيقتصر على مورد تصادق العنوانين و إن كانت متباينة فان كان الاحتمال بين أمور محصورة كما إذا لم يدر أنه وقف على المسجد الفلاني أو المشهد الفلاني أو فقراء هذا البلد أو ذلك يقرع و يعمل بها، و إن كان بين أمور غير محصورة فان كان بين عناوين و أشخاص غير محصورة كما اذا علم أنه وقف على ذرية أحد أفراد المملكة الفلانية و لا طريق إلى معرفته كانت منافعه بحكم مجهول المالك ، فيتصدق بها باذن الحاكم على الأحوط، و الأولى أن لا يخرج التصدق عن المحتملات مع كونها مورداً له و إن كان مردداً بين الجهات غير المحصورة كما اذا علم أنه وقف على جهة من الجهات و لم يعلم أنهامسجد أو مشهد أو قنطرة أو تعزية سيدالشهداء عليه السلام أو إعانة الزوار و هكذا تصرف المنافع في وجوه البرّ بشرط عدم الخروج عن مورد المحتملات.

مسألة ٦١ ـ لو كان للعين الموقوفة منافع متجددة و ثمرات متنوعة يملك الموقوف عليهم جميعها مع إطلاق الوقف، ففي الشاة الموقوفة يملكون صوفها

Problem # 58. If a person has made an endowment for the Leader of the Martyrs [or Imām Ḥusayn], A.S., it shall be spent on holding the meetings of mourning for him like payment to the one who narrates his tragic accounts and what is usually spent on those attending such meetings and others.

Problem # 59. There is no hesitation in declaring that an endower is not entitled to delete those included in the endowment or include those not included in it after the endowment has been finalised, if no such stipulation is made in the endowment deed. Now whether it is lawful for him to do if stipulated for in the endowment deed, is question that is not far from being replied in the negative as regards the permissibility of any inclusion or deletion absolutely, so that if he has made any such stipulation in the endowment deed, it shall be declared null and void; rather, there shall be hesitation in the validity of such endowment. The same rule shall apply if he has stipulated the transfer of the endowment from those in whose favour it has been made to those who are born later. Of course, if he has made an endowment in favour of a group as long as others are not born, and later it may be meant for those who are born later, it shall be valid without any objection.

Problem # 60. If a person knows about the making of an endowment but does not know about how it is to be spent even if due to his amnesia, then if the items on which it may be spent are actually likely and not opposed to [the purposes of] the endowment, it shall be spent on those items that are certain, as, for example, he does not know whether the endower has made it for the poor or the scholars, he shall confine its pending on persons possessing both the qualities, even if they were opposed to each other. If the likelihood was related to some limited ones, as, for example, he does not know whether the endower has made the endowment for such and such mosque, or holy shrine or the poor of this or that town, he shall cast lots and act accordingly. If the likelihood is unlimited so that it exists between unlimited items and persons, as, for example, when it is known that the endower has endowed it for the offspring of one of the individuals of such and such country, but there is no means for knowing as to who he is, its benefits shall be like those belonging to an anonymous owner, and so, according to the more cautious opinion, they shall be given in charity with the permission of the judge. It is better that the charity should also be given to those who are likely to be meant by the endower, even if he is doubtful about the unlimited purposes, as when he knows that he has endowed it for one of the purposes, but does not know that it relates to a mosque, a holy shrine, a bridge, or holding mourning meetings for the Leader of the Martyrs [i.e., Imām Husayn], A.S., or assistance to the pilgrims. Likewise the benefits of the endowment shall be spent on virtuous purposes provided they do not go beyond the limits of likelihood.

Problem # 61. If there are some fresh benefits accruing from the object of endowment and various fruits, they shall belong to all those in whose favour the endowment has been made provided the endowment has been made in general terms. So in case of an endowed sheep, its fresh wool, milk, offspring, and the like, and in case of palm trees and other trees, their fruits, right of shade, leaves,

المتجددة و لبنها و نتاجها و غيرها، وفي الشجر و النخل ثمر هما و منفعة الاستظلال بها والسعف و الأغصان والأوراق اليابسة، بل و غيرها مما قطعت للاصلاح، و كذا فروخهما و غير ذلك، و هل يجوز في الوقف التخصيص ببعض المنافع حتى يكون للموقوف عليهم بعض المنافع دون بعض؟ الأقوى ذلك.

مسألة ٦٢ ـ لو وقف على مصلحة فبطل رسمها كما إذا وقف على مسجد أو مدرسة أو قنطرة فخربت ولم يمكن تعميرها أو لم تحتج إلى مصرف لانقطاع من يصلي في المسجد و الطلبة و المارة و لم يرج العود صرف الوقف في وجوه البر، و الأحوط صرفه في مصلحة أخرى من جنس تلك المصلحة و مع التعذر يراعى الأقرب فالأقرب منها.

مسألة ٦٣ ـ إذا خرب المسجد لم تخرج عرصته عن المسجدية، فتجري عليها أحكامها إلا في بعض الفروض، و كذا لو خربت القرية التي هو فيها بقي المسجد على صفة المسجدية.

مسألة ٦٤ ـ لووقف داراً على أولاده أو على المحتاجين منهم فان أطلق فهو وقف منفعة، كما إذا وقف عليهم قرية أو مزرعة أو خاناً و نحوها يملكون منافعها، فلهم استنماؤها، فيقسمون بينهم ما حصل منها باجارة و غيرها على حسب ما قرره الواقف من الكمية و الكيفية، و إن لم يقرر كيفية في القسمة يقسمونه بينهم بالسوية، و إن وقفها عليهم لسكناهم فهو وقف انتفاع، و يتعين لهم ذلك، وليس لهم إجارتها، و حينئذ إن كفت لسكنى الجميع فلهم أن يسكنوها، و ليس لبعضهم أن يستقل به و يمنع غيره، و إن وقع بينهم تشاح في اختيار الحجر فان جعل الواقف متولياً يكون له النظر في تعيين المسكن للساكن كان نظره و تعيينه هو المتبع، و مع عدمه كانت القرعة هي المرجع، ولو سكن بعضهم و لم يسكنها بعض فليس له مطالبة الساكن بأجرة حصته إن لم يكن مانعاً عنه بل هو لم يسكن باختياره أو لمانع خارجي، و إن لم تكف لسكنى الجميع فان تسالموا على المهاياة أو غيرها فهو، و إلا كان المتبع نظر المتولي من قبل الواقف لتعيين

branches and dried leaves, rather even other things when chopped off from them for trimming, and so also their sprouts, etc., shall all belong to them. Is it permissible in an endowment to specify some of the benefits, so that some of the benefits to the exclusion of others may be specified for those in whose favour it is made, is a question whose answer, according to the stronger opinion, is in the affirmative.

Problem # 62. If a person makes an endowment for something that is later ruined, as when he makes an endowment for a mosque, a school or a bridge that later becomes devastated and it cannot be repaired, or it does not require anything to be spent on it due to the cessation of devotees offering prayers in the mosque or absence of students [in the schools] or passer-bys (on the bridge), and there is no hope of their becoming of use again, it shall be spent for virtuous purposes. It is more cautious to spend it on some thing of the same kind of purpose, and in case of inability it is to be spent on something closer to it one after another.

Problem # 63. If a mosque is ruined, its land shall still remain that of a mosque, and, except in some cases, it shall be treated as a mosque. Likewise, if a village is ruined but there is still a mosque, it shall continue to have the entity of a mosque.

Problem # 64. If a person endows a house for his children or the indigent among them, then if he has made it in general terms, it shall be an endowment of the benefit, in the same way as in case he has endowed for them a hamlet, farm, or an inn, or the like, its benefits shall belong to them, and they shall be entitled to utilise their benefits, so that whatever rent etc, accrues from them shall be divided among the beneficiaries according to what has been specified by the endower as to the quality and quantity. In case he has not specifically mentioned the mode of their division, they shall be divided equally among them. If he has endowed it for their residence, then it shall be an endowment for utilisation, and it shall be confined to residence only, and they shall not be entitled to rent it out to others. In such case, if it is sufficient for all to live in it, they shall all be entitled to live in it, and it shall not be lawful for some of them to utilise and deprive others from its use.

If some dispute arises among them as to the rooms, then if the endower has appointed a caretaker, it is shall be up to him to decide as to the allotment of the rooms for the dwellers, and his selection and decision shall be binding. In case otherwise, resort shall be made to casting lots, If some of them dwell there, and others do not, those who do not dwell there shall not be entitled to demand compensation for their portion in case there is no hindrance in their way of using it and he does not dwell in it of his own accord or due to some extraneous impeding factor. If it is not sufficient for accommodating all of them, then in case they agree to use it by turn or some other arrangement, well and good. Otherwise, the decision of the caretaker appointed by the endower for the allotment of the rooms shall be followed, and in case of his failure, the matter shall be decided by casting lots, so that the title to residence shall belong to one to whom it falls, and the others who do not live there shall not

الساكن، و مع فقده فالمرجع القرعة، فن خرج اسمه يسكن، و ليس لمن لم يسكن مطالبته بأجرة حصته.

مسألة ٦٥ ـ الثمر الموجود حال الوقف على النخل و الشجر لا يكون للموقوف عليهم، بل هو باقٍ على ملك الواقف، و كذلك الحمل الموجود حال وقف الحامل، نعم في الصوف على الشاة و اللبن في ضرعها إشكال فلا يترك الاحتياط.

مسألة ٦٦ ـ لو قال: «وقفت على أولادي و أولاد أولادي» شمل جميع البطون كما مر، فمع إشتراط الترتيب أو التشريك أو المساواة أو التفضيل أو الذكورة أو الأنوثة أو غير ذلك يكون هو المتبع، ولو أطلق فمقتضاه التشريك و الشمول للذكور و الاناث و المساواة و عدم التفضيل، ولو قال: «وقفت على أولادي ثم على أولاد أولادي» أفاد الترتيب بين الأولاد و أولاد الأولاد قطعاً، و أما بالنسبة إلى البطون اللاحقة فالظاهر عدم الدلالة على الترتيب، فيشترك أولاد الأولاد مع أولادهم إلا إذا قامت القرينة على أن حكمهم كحكمهم مع الأولاد و أن ذكر الترتيب بين الأولاد و أولاد الأولاد من باب المثال و المقصود الترتيب في سلسلة الأولاد و أن الوقف للأقرب فالأقرب إلى الواقف.

مسألة ٦٧ ـ لا ينبغي الاشكال في أن الوقف بعد تماميته يوجب زوال ملك الواقف عن العين الموقوفة إلا في منقطع الآخر الذي مرّ التأمل في بعض أقسامه، كما لا ينبغي الريب في أن الوقف على الجهات العامة كالمساجد و المشاهد و القناطر و الخانات و المقابر و المدارس و كذا أوقاف المساجد و المشاهد و أشباه ذلك لا يملكها أحد، بل هو فك الملك و تسبيل المنافع على جهات معينة، وأما الوقف الخاص كالوقف على الأولاد و الوقف العام على العناوين العامة كالفقراء و العلماء و نحوهما فهل يكون كالوقف على الجهات العامة لا يملك الرقبة أحد، سواء كان وقف منفعة بأن وقف ليكون منافع الوقف لهم فيستوفونها بأنفسهم أو بالاجارة أو ببيع الثمرة و غير ذلك، أو وقف انتفاع كما إذا وقف الدار لسكنى ذريته أو الخان لسكنى الفقراء، أو يملك الموقوف عليهم رقبته ملكاً غير طلق

be entitled to demand compensation for their portion.

Problem # 65. The fruits on the palm trees and other trees at the time an endowment is made shall not belong to those in whose favour it is made. Rather they shall continue to belong to the endower. The same rule belongs to the embryo in the womb of the pregnant [animal] endowed. Of course, there is hesitation regarding the ownership of the wool on the sheep or the milk in its teats, and, therefore, caution must not be given up [by reaching a compromise between the parties].

Problem # 66. If a man says: "I have endowed it for my children and grandchildren", it shall apply to all the generations, as mentioned earlier. If any stipulation has been made as to its being in an order, or their sharing by all, or equal distribution, or preference to be given to any of them, or its confinement to the males or females, etc. it shall have to be followed. If it is left unmentioned, then it shall be intended to mean sharing by all, and its application to males and females both, equal distribution and absence of preference to any of them. If he says: "I have endowed it for my children and then to my grandchildren", it shall certainly mean a proper succession between the children and the grandchildren. As regards the succeeding generations, apparently there is no proof of proper succession, so that it shall be applicable to the grandchildren along with their children, except when the text implies that they are to be treated at par with their children, and the proper succession has been mentioned just for an example, and the intention is succession among the children, and the endowment is made in favour of the closer to the endower to be preferred to the remoter.

Problem # 67. There must be no objection in that the finalisation of an endowment makes the termination of endower's ownership of the endowed object obligatory, except in case of an endowment to be terminated in the end in whose case hesitation has already been mentioned earlier in some of its kinds, in the same way as there is no doubt that in case of endowments for the purpose of public use, as mosques, holy shrines, bridges, inns, graveyards, schools, and likewise in case of endowments for the mosques, holy shrines and the like their ownership does not belong to any one; rather, in their case, the ownership is terminated and the benefits are channelled to purposes specified. In case of a private endowment, however, as an endowment in favour of children, or a general endowment for general purposes as one in favour of the poor, or scholars or the like, does the ownership of the land not belong to any one as in case of public endowment, regardless whether it is endowment for benefit where the endower endows the benefits of the endowment for those for whom it is made so that they enjoy the benefits themselves or by leasing them or selling fruits, etc. or it is endowment for utilisation as when a person endows a house for the purpose of residence of his offspring or an inn for the residence of the poor, or the ownership of the land belongs to those in whose favour the endowment is made without the ownership being absolute, or there is difference between an endowment for benefit and that for utilisation, so that the latter is like a public endowment but not the former, or there is difference between the private and public endowments in so far as in the former, the ownership belongs to the person in

مطلقا، أو تفصيل بين وقف المنفعة و وقف الانتفاع، فالثاني كالوقف على الجهات العامة دون الأول، أو بين الوقف الخاص فيملك الموقوف عليه ملكا غير طلق، و الوقف العام فكالوقف على الجهات؟ وجوه، لا يبعد أن يكون اعتبار الوقف في جميع أقسامه إيقاف العين لدرّ المنفعة على الموقوف عليه، فلا تصير العين ملكاً لهم، وتخرج عن ملك الواقف إلا في بعض صور المنقطع الآخر كما مرّ.

مسألة ٦٨ ـ لا يجوز تغيير الوقف و إبطال رسمه و إزالة عنوانه ولو إلى عنوان آخر كجعل الدار خاناً أو دكاناً أو بالعكس، نعم لو كان الوقف وقف منفعة و صار بعنوانه الفعلي مسلوب المنفعة أو قليلها في الغاية لا يبعد جواز تبديله إلى عنوان آخر ذي منفعة، كما إذا صار البستان من جهة انقطاع الماء عنه أو لعارض آخر لم ينتفع به، بخلاف ما إذا جعل داراً أو خاناً.

مسألة ٦٩ ـ لو خرب الوقف و انهدم و زال عنـوانه كالبستان انقلعت أو يبست أشجاره، والدار اذا تهدمت حيطانها و عفت آثارها فان أمكن تعميره و إعادة عنوانه ولو بصرف حاصله الحاصل بالاجارة و نحوها لزم، و تعين على الأحوط، و إلا ففي خروج العرصة عن الوقفية و عدمه فيستنمى منها بوجه آخر ولو بزرع و نحوه و جهان بل قولان، أقواهما الثاني، و الأحوط أن تجعل وقفاً و يجعل مصرفه و كيفياته على حسب الوقف الأول.

مسألة ٧٠ ـ إذا احتاجت الأملاك الموقوفة إلى تعمير و ترميم و إصلاح لبقائها و الاستنماء منها فان عيّن الواقف لها ما يصرف فيها فهو، و إلايصرف فيهامن نمائها على الأحوط مقدماً على حق الموقوف عليهم، و الأحوط لهم الرضا بذلك، ولو توقف بقاؤها على بيع بعضها جاز.

مسألة ٧١ ـ الأوقاف على الجهات العامة التي مرّ أنها لا يملكها أحد كالمساجد و المشاهد و المدارس و المقابر و القناطر و نحو ها لا يجوز بيعها بلا إشكال في مثل الأولين، و على الأحوط في غيره و إن آل إلى ما آل حتى عند

whose favour the endowment is made, but not in the latter, as an endowment made for the purposes of the public ? There are several aspects of it. It is not far from likelihood that in all the kinds of endowment the condition is that the benefit must come down to the person in whose favour the endowment is made, and so the ownership [of endowment] does not belong to him, though it ceases to belong to the endower except in some cases of endowment terminating at the end, as mentioned earlier.

Problem # 68. It is not permissible to change en endowment, alter its shape or cancel its title, even if to another one, as turning a house into an inn or a shop, or vice versa. Of course if the endowment was an endowment for benefit, and with the present title it has lost its benefit or it yields very little benefit, it is not far from being permissible to change its title to another yielding benefit, as when a garden due to the disconnection of water or any other factor ceases to yield any benefit, contrary to when it is turned into a house or an inn.

Problem # 69. If the subject of endowment is ruined or devastated and loses its title as a garden when its trees are uprooted and are dried up, or a house when its walls fall down or its traces are destroyed, then if it can be repaired and restored to its former position even if by spending its income earned through its rent or the like, it shall be indispensable to do it and, according to the more cautious opinion, it is binding. Otherwise, as regards the question whether it ceases to be an endowment or continues to be so, so that it may be exploited in sôme other way, even by farming or the like, there are two alternatives, rather opinions, the stronger being in favour of the latter. It is more cautious to let it continue as an endowment, and its use and mode of use must remain as before.

Problem # 70. If an endowed property requires repair, alteration or improvement for its survival or capability of being exploited, then in case the endower has appointed something to be spent on it, well and good. Otherwise, according to the more cautious opinion, its income shall be spent on it in preference to the right of those in whose it is endowed, though it is more cautious to obtain their consent for it. If its survival depends on the sale of a part of it, it shall be permissible [to do so].

Problem # 71. In case of endowments for public uses, about which it has been mentioned that their ownership does not belong to any one, as mosques, holy shrines, schools, graveyards, bridges, and the like, it is not permissible to sell them without there being any hesitation in this rule in respect of the first two, namely, the mosques and holy shrines, and, according to the more cautious opinion, in respect of the others too, although they may face the worst, even they are ruined and devastated to the extent that there is no hope of using them for the purpose they are intended to serve; rather they must be allowed to remain in whatever condition they are.

This is as regards their actual structures, but as regards their attached articles as the equipments, carpets, covers of the graves and the like, as long as they exist in their actual condition, it

خرابها و اندارسها بحيث لا يرجى الانتفاع بها في الجهة المقصودة أصلاً بل تبقى على حالها، هذا بالنسبة إلى أعيانها، و أما ما يتعلق بها من الآلات و الفرش و ثياب الضرائح و أشباه ذلك فما دام يمكن الانتفاع بها باقية على حالها لا يجوز بيعها، و إن أمكن الانتفاع بها في المحل الذي أعدت له بغير ذلك الانتفاع الذي أعدت له بقيت على حالها أيضاً، فالفرش المتعلقة بمسجد أو مشهد إذا أمكن الافتراش بها في ذلك المحل بقيت على حالها فيه، ولو فرض استغناؤه عن الافتراش بالمرة لكن يحتاج إلى ستر يقي أهله من الحرّ أو البرد مثلاً تجعل ستراً لذلك المحل، ولو فرض استغناء المحل عنها بالمرة بحيث لا يترتب على إمساكها و إبقائها فيه إلا الضياع و الضرر و التلف تجعل في محل آخر مماثل له، بأن تجعل ماللمسجد لمسجد آخر، و ما للمشهد لمشهد آخر، فان لم يكن المماثل أو استغنى عنها بالمرة جعلت في المصالح العامة، هذا إذا أمكن الانتفاع بها باقية على حالها، و أما لو فرض أنه لا يمكن الانتفاع بها إلا ببيعها و كانت بحيث لو بقيت على حالها ضاعت و تلفت، بيعت و صرف ثمنها في ذلك المحل ان احتاج اليه، و الا ففي المماثل ثم المصالح حسب ما مرّ.

مسألة ٧٢ ـ كما لا يجوز بيع تلك الأوقاف الظاهر أنه لا يجوز إجارتها، ولو غصبها غاصب و استوفى منها غير تلك المنافع المقصودة منها كما إذا جعل المسجد أو المدرسة بيت المسكن فلا يبعد أن تكون عليه أجرة المثل في مثل المدارس والخانات والحمامات دون المساجد و المشاهد و المقابر و القناطر و نحو ها ولو أتلف أعيانها متلف فالظاهر ضمانه، فيؤخذ منه القيمة، و تصرف في بدل التالف و مثله.

مسألة ٧٣ ـ الأوقاف الخاصة كالوقف على الأولاد و الأوقاف العامة التي كانت على العناو ين العامة كالفقراء لا يجوز بيعها و نقلها بأحد النواقل إلا لعروض بعض العوارض و طرو بعض الطوارىء، و هي أمور:

الأول ـ ما إذا خربت بحيث لا يمكن إعادتها إلى حالها الأولى و لا الانتفاع

is not permissible to dispose them off, and even if they can be utilised in the place for which they are arranged though for a use other than they were intended for, they shall also be left in whatever condition they are.

So the carpet meant for the mosque or the holy shrine if laid on the floor of that place shall continue in that place in whatever condition it is. If it is supposed that there is no need at all of carpeting, but it is needed, for example, as a cover against heat or cold for the people of that place, it shall be made a cover for that place.

If, however, it is supposed that the place is not at all in need of it so that if it remains there it shall serve no purpose except that it would rather do harm and cause wastage and destruction, it shall be shifted to another place like that. So if it belongs to a mosque, it may be shifted to another mosque, and if belongs to a holy shrine, it may be shifted to another holy shrine.

If there are no similar places, or they are not at all in need of it, it may be used in public interest. This is the case when it remains in its actual condition and can be used.

If, however, it is supposed that it cannot be of any use except by selling it, and is in a condition that if it is left as it is, it shall be destroyed and wasted, it shall be sold, and its sale proceeds spent on that place, if so needed. Otherwise, they shall be spent on similar places, or used for public interest, as mentioned earlier.

Problem # 72. As it is not permissible to sell these endowments, in the same way it is apparent that it is not permissible to rent them out.

If some usurper usurps them and earns some benefits intended from them as when he turns a mosque or a school into a dwelling place, it shall not be far from charging proper rent from him as is charged from such schools, inns, public baths to the exclusion of mosques, holy shrines, mausoleums, bridges and the like.

If some destroyer destroys them, then apparently he shall be held liable for it, and he shall have to pay their price, that shall be spent to make good the loss or the like.

Problem # 73. It is not permissible to sell or make any change or alteration in private endowments as those in favour of the [deceased's] children or the public endowments made for public purposes as those for the poor except due to occurrence of some accidental or new obstructions or changes. They include the following:

بها إلا ببيعها و الانتفاع بثمنها كالحيوان المذبوح و الجذع البالي و الحصير الخلق فتباع و يشترى بثمنها ما ينتفع به الموقوف عليهم، و الأحوط لو لم يكن الأقوى مراعاة الأقرب فالأقرب إلى العين الموقوفة.

الثاني ـ أن يسقط بسبب الخراب أو غيره عن الانتفاع المعتدبه، بحيث كان الانتفاع به بحكم العدم بالنسبة إلى أمثال العين الموقوفة بشرط أن لا يرجى العود كما مر، كما إذا انهدمت الدار و اندرس البستان فصار عرصة لا يمكن الانتفاع بها إلا بمقدار جزئي جداً يكون بحكم العدم بالنسبة اليها، لكن لو بيعت يمكن أن يشترى بثمنها دار أو بستان آخر أو ملك آخر تساوي منفعته منفعة الدار أو البستان أو تقرب منها أو تكون معتداً بها، ولو فرض أنه على تقدير بيعها لا يشترى بثمنها إلا ما يكون منفعتها كمنفعتها باقية على حالها أو قريب منها لم يجز بيعها، و تبقى على حالها.

الثالث ـ ما إذا اشترط الواقف في وقفه أن يباع عند حدوث أمر مثل قلة المنفعة، أو كثرة الخراج أو المخارج، أو وقوع الخلاف بين أربابه، أو حصول ضرورة أو حاجة لهم أو غير ذلك، فلا مانع من بيعه عند حدوث ذلك الأمر على الأقوى.

الرابع ـ ما إذا وقع بين أرباب الوقف اختلاف شديد لا يؤمن معه من تلف الأموال و النفوس و لا ينحسم ذلك إلا ببيعه،فيباع، و يقسّم ثمنه بينهم، نعم لو فرض أنه يرتفع الاختلاف ببيعه و صرف الثمن في شراء عين أخرى أو تبديل العين الموقوفة بالأخرى تعين ذلك ، فتشترى بالثمن عين أخرى أو يبدل بآخر فيجعل وقفاً و يبقى لسائر البطون، و المتولي للبيع في الصور المذكورة و للتبديل و لشراء عين أخرى هو الحاكم أو المنصوب من قبله إن لم يكن متول منصوب من قبل الواقف.

مسألة ٧٤ ـ لا إشكال في جواز إجارة ما وقف وقف منفعة، سواء كان وقفاً خاصاً أو عاماً على العناوين أو على الجهات و المصالح العامة كالدكاكين و

First. If an endowed object is destroyed or ruined in a way that it is not possible to restore to its first condition, and it is of no other utilisation except sale and make use of its sale proceeds, as a slaughtered animal, an emaciated trunk of a tree, an old and rotten mat. In such case, it shall be sold and with its sale proceeds something beneficial shall be purchased for those in whose favour the endowment has been made.

It is more cautious even if it is not according to the stronger opinion to purchase something as close to the original endowed object as possible.

Second. Due to destruction or some other factor, the endowed object loses considerably the benefit that was intended from it, in a way that the utilisation from it may be considered to be nothing as compared to other similar endowed objects, provided that it is not possible to restore it to its original condition, as already mentioned, as a mansion is ruined or a garden is wiped out in a way that it turns into a desolate land that cannot be utilised except negligibly to the extent of being considered nothing as compared to their original position, but if they are sold, it is possible to purchase another mansion or garden with their sale proceeds whose utilisation may be like that of the mansion or garden sold, or it may be close to it, or to a considerable extent. If, however, if it is supposed that by selling it, it would be possible to purchase with its sale proceeds something whose utilisation would be equal to the object if it is left in its present condition or close to it, it shall not be allowed to be sold, but must be allowed to remain as it is.

Third. When the endower has mentioned in the endowment deed that it may be sold in case of occurrence of an event like the curtailment of its utility, excess of taxes or expenses, or difference arising among its beneficiaries, or in case of an emergency or need to them, etc. In case any of such events takes place, according to the stronger opinion, there shall be no hindrance in selling the endowed object.

Fourth. In case a strong difference takes place among the beneficiaries of the endowment as a result of which there is every danger of the loss of the property and lives and it cannot be settled except by selling it. In such case, it shall be sold, and the sale proceeds shall be divided among them.

If, however, it is supposed that the difference may be removed by selling the endowed object and purchasing another object with its sale proceeds, or by exchanging the endowed object with another object, it shall be resorted to. So another object shall be purchased and with its sale proceeds another object shall be exchanged, and it shall be endowed and left for the future generations.

The person in charge for sale in the said cases, or for exchange or purchase of another object shall be the judge or a person appointed by him, if such person has not been appointed by the endower.

Problem # 74. It is permissible to rent out an endowed object in case of a utilisation endowment, regardless whether it is a private or a public endowment meant for the purposes and interests of the

المزارع الموقوفة على الأولاد أو الفقراء أو الجهات العامة، حيث أن المقصود استنماؤها باجارة و نحوها و وصول نفعها إلى الموقوف عليهم، بخلاف ما كان وقف انتفاع كالدار الموقوفة على سكنى الذرية وكالمدرسة والمقبرة والقنطرة و الخانات الموقوفة لنزول المارة، فان الظاهر عدم جواز إجارتها في حال من الأحوال.

مسألة ٧٥ـ لو خرب بعض الوقف بحيث جاز بيعه و احتاج بعضه الآخر الى التعمير لحصول المنفعة فان أمكن تعمير ذلك البعض المحتاج من منافعه فالأحوط تعميره منها، و صرف ثمن البعض الآخر في اشتراء مثل الموقوفة، و ان لم يمكن لا يبعد أن يكون الأولى بل الأحوط أن يصرف الثمن في التعمير المحتاج اليه، و أما جواز صرفه لتعميره الموجب لتوفير المنفعة فبعيد، نعم لو لم يكن الثمن بمقدار شراء مثل الموقوفة يصرف في التعمير ولو للتوفير.

مسألة ٧٦ـ لا إشكال في جواز إفراز الوقف عن الملك الطلق فيما اذا كانت العين مشتركة بينهما، فيتصديه مالك الطلق مع متولي الوقف أو الموقوف عليهم، بل الظاهر جواز قسمة الوقف أيضاً لو تعدد الواقف والموقوف عليه، كما اذا كانت دار مشتركة بين شخصين فوقف كل منهما حصته المشاعة على أولاده، بل لا يبعد الجواز فيما اذا تعدد الوقف و الموقوف عليه مع اتحاد الواقف، كما إذا وقف نصف داره مشاعاً على مسجد و النصف الآخر على مشهد، و لا يجوز قسمته بين أربابه إذا اتحد الوقف و الواقف مع كون الموقوف عليهم بطوناً متلاحقة أيضاً، ولو وقع النزاع بين أربابه بما جاز معه بيع الوقف و لا ينحسم إلا بالقسمة جازت، لكن لا تكون نافذة بالنسبة إلى البطون اللاحقة، و لعلها ترجع إلى قسمة المنافع، و الظاهر جوازها مطلقاً، و أما قسمة العين بحيث تكون نافذة بالنسبة إلى البطون اللاحقة فالأقوى عدم جوازها مطلقاً.

مسألة ٧٧ـ لو آجر الوقف البطن الأول وانقرضوا قبل انقضاء مدة الاجارة بطلت بالنسبة إلى بقية المدة إلا أن يجيز البطن اللاحق فتصح على الأقوى، ولو

public like shops or farms endowed for [the deceased's] children or the poor or public works, where the intention to use the rent or the like for the benefit of those in whose favour it has been endowed.

This is contrary to the case of a utilisation endowment as a house endowed to be utilised for the purpose of residence by the [deceased's] offspring, or a school, mausoleum, bridge or inns endowed for accommodating travellers, so that apparently it is not permissible to rent them out in any case what so ever.

Problem # 75. If part of the endowed object has been destroyed in a way that it could be sold while another part of it requires repair for getting benefit from it, then in case it is possible repair that part requiring repairs out of its own benefits, then it is more cautious to have it repaired out of that, and to spend the sale proceeds of the other part in purchasing some thing similar to the endowed one. If it is not possible, then it is not far from being preferable, rather more cautious to spend the sale proceeds [of the former part] for repairs required [for the latter]. As far as the permissibility of its sale for raising its utility is concerned, it is far [from being permissible].If, however, the sale proceeds [of the former] is not sufficient for the purchase of some object similar to the endowed one, it shall be spent on the repairs, even it is meant to raise its utility.

Problem # 76. There is no objection in separating the endowed object from the free [or non-endowed] one, in case they belong to a joint property, so that it shall be in the joint charge of the owner of the free portion as well as the trustee of the endowment or those in whose favour it is endowed.

Rather, apparently it is also permissible to divide the endowed property if there are several endowers and those in whose favour it is endowed, as when it is a house jointly owned by two persons, each of them endowing his joint portion in favour of his respective future generations.

Rather, it is not far from being permissible even if there are several endowments and the parties in whose favour they have been made, while there is a single endower, as when a person endows half of his house jointly for a mosque and the other half for a shrine. If there is a single endowment and endower, while those in whose favour it has been made also include the future generations, it would not be permissible to divide it among the present donees.

If a dispute arises among the present donees when it becomes permissible to sell it, and it is not settled except by its sale, it is shall be permissible [to sell it], but it shall not apply to the future generations. Perhaps in such case, it shall revert to the division of the benefits. Apparently, it is permissible in all circumstances. As regards the division of the endowed property in a way that it should also apply to the future generations, according to the stronger opinion, it is not permissible at all.

Problem # 77. If those belonging to the first generation rent out endowed property and become extinct before the maturity of the lease, it shall be declared void in respect of the remaining period, except

آجره المتولي فان لاحظ فيه مصلحة الوقف صحت و نفذت بالنسبة إلى البطون اللاحقة، بل الأقوى نفوذها بالنسبة إليهم لو كانت لأجل مراعاتهم دون أصل الوقف، و لا تحتاج إلى إجازتهم.

مسألة ٧٨ ـ يجوز للواقف أن يجعل تولية الوقف و نظارته لنفسه دائماً أو إلى مدة مستقلاً و مشتركاً مع غيره، و كذا يجوز جعلها للغير كذلك ، بل يجوز أن يجعل أمر جعل التوليه بيد شخص، فيكون المتولي من يعيّنه ذلك الشخص، بل يجوز جعل التولية لشخص و يجعل أمر تعيين المتولي بعده بيده، و هكذا يقرر أن كل متولٍ يعين المتولي بعده.

مسألة ٧٩ ـ انما يكون للواقف جعل التولية لنفسه أو لغيره حين إيقاع الوقف و في ضمن عقده، و أما بعد تماميته فهو أجنبي عن الوقف، فليس له جعل التولية و لا عزل من جعله متولياً إلا إذا اشترط في ضمن عقده لنفسه ذلك، بأن جعل التولية لشخص و شرط أنه متى أراد أن يعزله عزله.

مسألة ٨٠ ـ لا إشكال في عدم اعتبار العدالة فيما إذا جعل التولية و النظر لنفسه، و الأقوى عدم اعتبارها لو جعلها لغيره أيضاً، نعم يعتبر فيه الأمانة و الكفاية، فلا يجوز جعلها خصوصاً في الجهات و المصالح العامة لمن كان خائناً غير موثوق به، و كذا من ليس له الكفاية في تولية أمور الوقف، و لا يجوز جعل التولية للمجنون و لا الطفل حتى المميز ان أريد عمل التولية من إجارة الوقف و أمثالها مباشرة، و أما اذا جعل التولية له حتى يقوم القيم بأمرها مادام قاصراً فالظاهر جوازه ولو كان غير مميز، بل لا يبعد الجواز في جعلها لمجنون متوقع برؤه و يقوم الولي مقامه الى أن يفيق.

مسألة ٨١ ـ لو جعل التولية لشخص لم يجب عليه القبول، سواء كان حاضراً في مجلس العقد أو غائباً بلغ اليه الخبر ولو بعد وفاة الواقف، ولو جعل التولية لأشخاص على الترتيب وقبل بعضهم لم يجب القبول على من بعده، و مع عدم القبول كان الوقف بلا متولٍ منصوب، ولو قبل التولية فهل يجوز له عزل نفسه

when it is assented to by the following generation, in which case, according to the stronger opinion, it shall be valid. If the endowed property is given on lease by its trustee t, then if he has observed the interest of the endowment, it shall be valid, and it shall be applicable even in respect of the following generations. Rather, according to the stronger opinion, it shall be applicable even in respect of them if the lease were in observation of their interest and not the endowed property, and it shall not be required to be assented to by them.

Problem # 78. It is permissible for the endower to keep the trusteeship and supervision of the endowment to himself permanently, for a specified period, or jointly with another person. Likewise, it is permissible for him to make it in like manner for another person. Rather, it is also permissible for him to place the power of appointing a trustee for the endowment in the hands of a person. So who so ever is appointed by that person shall be the trustee. Rather it is also permissible for him to appoint some one as a trustee, and also give him the power to appoint a trustee after himself in his hands. Similarly, he may prescribe that each trustee shall appoint the trustee after himself.

Problem # 79. It is up to the endower to keep the trusteeship for himself or for another at the time of making the endowment or at the time of conclusion of the contract. However, after the finalisation of the contract he shall be a stranger as regards the endowment. He shall then have no power to appoint a trustee, or dismiss one whom he has once appointed a trustee, except when he has reserved such title for himself in the contract, so that he may appoint any person as a trustee and stipulate the trustee shall be dismissed whenever he intended to dismiss him.

Problem # 80. There is not objection in the absence of a condition of moral soundness (*'Adālat*) in case an endower keeps the trusteeship and supervision [of the endowment] for himself. Likewise, there shall be no such condition even if he confers it upon someone else. Of course, it is a condition that the person must be honest and competent. It is not permissible to appoint a person as a trustee and supervisor particularly for public purposes and interests if he is dishonest and unreliable. The same rule shall apply to a person who is not competent to handle trusteeship of the affairs relating to endowment. It is not permissible to appoint a lunatic or a minor even he were discreet as a trustee if he is intended to act as a trustee personally in case of renting out the endowed object or the like. If the trusteeship is conferred upon him but it is to be officiated by a custodian as long as he has been a minor, then apparently it shall be permissible, even if the child is not discreet. Rather, it is not far from being permissible even in case of appointing a lunatic as a trustee who is expected to revert to sanity, and his guardian officiates for the lunatic as long his sanity is not restored.

Problem # 81. If a person appoints another as a trustee, he is not bound to accept it, regardless whether he was present at the time of conclusion of the contract or was absent and the news of his appointment as trustee has reached him even after the death of the endower. If a person appoints several persons as trustees in succession and some of them accept it, it is not necessary for those who

كالوكيل أم لا؟ قولان لا يترك الاحتياط بعدم العزل، و معه يقوم بوظائفه مع المراجعة الى الحاكم و نصبه.

مسألة ٨٢ ـ لو جعل التولية لاثنين فان جعل لكل منهما مستقلاً استقل، و لا يلزم عليه مراجعة الآخر، و اذا مات أحدهما أو خرج عن الأهلية انفرد الآخر، و إن جعلهما بالاجتماع ليس لأحدهما الاستقلال، و كذا لو أطلق و لم تكن على ارادة الاستقلال قرائن الأحوال، فحينئذ لو مات أحدهما أو خرج عن الأهلية يضم الحاكم الى الآخر شخصاً آخر على الأحوط لو لم يكن الأقوى.

مسألة ٨٣ ـ لو عيّن الواقف وظيفة المتولي و شغله فهو المتبع، ولو أطلق كانت وظيفته ما هو المتعارف من تعمير الوقف و اجارته و تحصيل أجرته وقسمتها على أربابه و أداء خراجه و نحو ذلك ، كل ذلك على وجه الاحتياط و مراعاة الصلاح، و ليس لأحد مزاحمته فيه حتى الموقوف عليهم، و يجوز أن يجعل الواقف تولية بعض الأمور لشخص و بعضها لآخر، فجعل أمر التعمير و تحصيل المنافع مثلاً لأحد و أمر حفظها وقسمتها على أربابها لآخر، أو جعل لواحد أن يكون الوقف بيده و حفظه و للآخر التصرفات ولو فوض الى واحد أمراً كالتعمير و تحصيل الفائدة و أهمل باقي الجهات من الحفظ و القسمة و غيرهما كان الوقف بالنسبة الى غير ما فوض اليه بلا متولٍ منصوب، فيجري عليه حكمه الآتي.

مسألة ٨٤ ـ لو عيّن الواقف للمتولي سيأ من المنافع تعين، و كان ذلك أجرة عمله ليس له أزيد منه و ان كان أقل من أجرة مثله، ولو لم يعين شيئاً فالأقرب أن له أجرة المثل.

مسألة ٨٥ ـ ليس للمتولي تفويض التولية الى غيره حتى مع عجزه عن التصدي إلا اذا جعل الواقف له ذلك عند جعله متولياً، نعم يجوز له التوكيل في بعض ما كان تصديه وظيفته ان لم يشترط عليه المباشرة.

مسألة ٨٦ ـ يجوز للواقف أن يجعل ناظراً على المتولي، فان أحرز أن المقصود مجرد اطلاعه على أعماله لأجل الاستيثاق فهو مستقل في تصرفاته و لا يعتبر إذن

follow to accept it. In case of non-acceptance, the endowment shall remain without an appointed trustee.

If a person accepts the trusteeship, shall it be permissible for him to dismiss himself as an agent or not, is question on which there are two opinions. Caution must not be given up by not resorting to dismissing himself. If he dismisses himself, he must continue performing his duties, and at the same time refer the matter to the judge and appoint him as the trustee.

Problem # 82. If a person appoints two persons as trustee, then if he appoints each of them independently, each of them shall act independently, and shall not be obliged to consult the other. If one of them dies or loses the capacity to act as a trustee, the other shall continue to act singly. If, however, he appoints them to act jointly, neither of them shall be authorized to act independently. The same shall be the case if he has left the matter unmentioned, and the context also does not allude to their acting independently. In such circumstances, if one of them dies or is divested of the capacity to act as trustee, the judge shall add another person as trustee according to the more cautious opinion, even if it is not the stronger one.

Problem # 83. If the endower specifies the duty of the trustee and his job, the trustee shall adhere to it. If he leaves it unmentioned, the duty of the trustee shall be according to the prevalent custom as regards the repair of the object of trust, its lease, collection of its rent, and its distribution among the owners of the trust, payment of its tax, and the like. He shall observe caution and the interest of the trust in the performance of all these acts, and no one shall have the authority to intervene in the performance of these acts including even those in whose favour the trust has been made. The trustee shall be entitled to entrust some of the matters relating to the trust to one person and some other to another. For example, he may entrust the work of repair and collection of the benefits (income) to one person, and the work of their protection and distribution among their owners to another. Or he may appoint one person to possess and protect the object of trust, and another to make necessary changes in it. So if he entrusts a work like repair and collection of benefit to one person, but neglects the other departments such as its protection and division, etc., the trust shall be without any appointed trustee to the exclusion of the work that he has entrusted to some one. The following law shall apply in his case.

Problem # 84. If the endower has specified a part of the benefits (income of the trust) for the trustee, the trustee shall confine himself to it, and it shall be the wages for his work, and he shall not be entitled to more than that, even if it is less than his proper wages. If he has not specified any wages, then according to the opinion closer to the traditional authority he shall be entitled to the proper wages.

Problem # 85. The trustee is not entitled to entrust his trusteeship to any one else even in case of his inability to do it, except in case the donor has authorized him to do so at the time of appointing him as the trustee. Of course, he shall be entitled to assign part of his assignment and duty (to another), provided that there is no stipulation for its performance personally by him.

Problem # 86. An endower is entitled to appoint a supervisor over the trustee. If it is known that the purpose of the endower is to get information about the activities of the trustee for verification, the trustee shall be independent in his changes and there shall be no condition of obtaining the permission of the

الناظر في صحتها و نفوذها، و انما اللازم عليه اطلاعه، و إن كان المقصود إعمال نظره و تصو يبه لم يجز له التصرف إلا باذنه و تصو.يبه، ولو لم يحرز مراده فاللازم مراعاة الأمرين.

مسألة ٨٧ ـ لو لم يعين الواقف متولياً أصلاً في الاوقاف العامة يكون الحاكم أو المنصوب من قبله متولياً على الأقوى، و كذا في الخاصة فيما يرجع إلى مصلحة الوقف و مراعاة البطون من تعميره و حفظ الأصول و إجارته للبطون اللاحقة، و أما بالنسبة إلى تنميته و إصلاحاته الجزئية المتوقف عليها حصول النماء الفعلي كتنقية أنهاره و كريه و حرثه و جمع حاصله و تقسيمه و أمثال ذلك فأمرها راجع إلى الموقوف عليهم الموجودين.

مسألة ٨٨ ـ في الأوقاف التي توليتها للحاكم و منصوبه، مع فقدهما و عدم الوصول اليهما توليتها لعدول المؤمنين.

مسألة ٨٩ ـ لا فرق فيما كان أمره راجعاً إلى الحاكم بين ما إذا لم يعين الواقف متولياً و بين ما إذا عين و لم يكن أهلاً لها أو خرج عن الأهلية، فاذا جعل للعادل من أولاده و لم يكن بينهم عادل أو كان ففسق كان كأن لم ينصب متولياً.

مسألة ٩٠ ـ لو جعل التولية لعدلين من أولاده مثلاً و لم يكن فيهم إلا عدل واحد ضم الحاكم اليه عدلاً آخر، و أما لو لم يكن فيهم عدل أصلاً فهل اللازم عليه نصب عدلين أو يكفي نصب واحد أمين؟ أحوطهما الأول، و أقواهما الثاني.

مسألة ٩١ ـ لو احتاج الوقف إلى التعمير و لم يكن ما يصرف فيه يجوز للمتولي أن يقترض له قاصداً أداء ما في ذمته بعد ذلك مما يرجع اليه كمنافعه أو منافع موقوفاته، فيقترض متولي البستان مثلاً لتعميره بقصد أن يؤدي دينه من عائداته، و متولي المسجد أو المشهد أو المقبرة و نحوها بقصد أن يؤديه من عائدات موقوفاتها، بل يجوز أن يصرف في ذلك من ماله بقصد الاستيفاء مما ذكر، ولو اقترض له و صرفه لا بقصد الأداء منه أو صرف ماله لا بقصد الاستيفاء منه لم

supervisor for their validity and enforcement, and all that he is required to do is merely to inform the supervisor. If the purpose of the endower is for the supervisor to give his opinion and approve the deeds of the trustee, the trustee shall not be allowed to bring about any change without the permission and approval of the supervisor. If the purpose of the donor is not clear, it shall be necessary for the trustee to fulfil both the requirements.

Problem # 87. If the endower has not appointed any trustee at all, then, according to the stronger opinion, in case of private trusts the judge or his appointee shall be the trustee. The same shall be the case in special trusts in matters relating to the interest of the trust and the future generations as regards the repair of the object of trust, protection of its trees and renting it out for the future generations. But in respect of the growth of the object of trust and the minor repairs on which the current growth depends as the dredging of the canals, cultivation and collection of its produce and its distribution and the like, they are to be performed by the existing beneficiaries of the trust.

Problem # 88. In case of the trusts whose trusteeship belongs to the judge or his appointee, in the event of unavailability of both, or their inaccessibility, their trusteeship shall belong to the just believers.

Problem # 89. There is no difference as regards the matter relating to the judge between the case when the donor has not appointed a trustee and when he has appointed a trustee but he is not competent or has lost competence. If the donor has specified the trusteeship for his just children, but there is no just person among them, or there was one but he has turned depraved, it shall be as if no trustee has been appointed for it.

Problem # 90. If an endower has specified the trusteeship, for example, for two just persons from among his children, but there happens to be a single just person among them, the judge shall add another just person with him. If, however, there is no just person among them at all, then whether it is necessary for the judge to appoint two just persons or it will be sufficient for him to appoint a single just person; it is more cautious for him to appoint two just persons, though according to the stronger opinion, the appointment of a single just person shall be sufficient.

Problem # 91. If the endowed property needs repair, but there is nothing that can be spent on it, the trustee shall be entitled to borrow something for it with the intention of repaying the debt later out of what belongs to the trust as his own income or the income of the trust. So a trustee, for example, of a garden may borrow something for its repair with the intention of repaying the debt out of its income. A trustee of a mosque, a shrine, a mausoleum, or the like, may borrow with the intention of repaying the debt out of the income of the objects of trust. Rather he is allowed to spend out of his own property with the intention of setting it off in the way mentioned. If, however, he borrows something for it and spent it without the intention of repaying it out of the income of the trust or spends something out of his own

يكن له ذلك بعده.

مسألة ٩٢ ـ تثبت الوقفية بالشياع المفيد للعلم أو الاطمئنان، و باقرار ذي اليد أو ورثته بعد موته، و بكونه في تصرف الوقف بأن يعامل المتصرفون فيه معاملة الوقف بلا معارض، و بالبيّنة الشرعية.

مسألة ٩٣ ـ لو أقر بالوقف ثم ادعى أن إقراره كان لمصلحة يسمع منه لكن يحتاج الى الإثبات لو نازعه منازع صالح، بخلاف ما اذا أوقع العقد و حصل القبض ثم ادعى أنه لم يكن قاصداً، فانه لا يسمع منه أصلاً، كما هو الحال في جميع العقود و الايقاعات.

مسألة ٩٤ ـ كما أن عمل المتصرفين معاملة الوقفية دليل على أصل الوقفية ما لم يثبت خلافها كذلك كيفية عملهم من الترتيب والتشريك و المصرف و غير ذلك دليل على كيفيته، فيتبع ما لم يعلم خلافها.

مسألة ٩٥ ـ لو كان ملك بيد شخص يتصرف فيه بعنوان الملكية لكن علم أنه قد كان في السابق وقفاً لم ينتزع من يده بمجرد ذلك ما لم يثبت و قفيته فعلاً، و كذا لو ادعى أحد أنه قد وقف على آبائه نسلاً بعد نسل و أثبت ذلك من دون أن يثبت كونه وقفاً فعلاً، نعم لو أقرّ ذو اليد في مقابل دعوى خصمه بأنه كان وقفاً إلا أنه قد حصل مسوغ البيع و قد اشتراه سقط حكم يده و ينتزع منه، و يلزم باثبات وجود المسوغ و وقوع الشراء.

مسألة ٩٦ ـ لو كان كتاب أو مصحف أو غيرهما بيد شخص و هو يدعي ملكيته و كان مكتوباً عليه أنه وقف لم يحكم بوقفيته بمجرده، فيجوز الشراء منه، نعم الظاهر أن وجود مثل ذلك عيب و نقص في العين، فلو خفي على المشتري حال البيع كان له الخيار.

مسألة ٩٧ ـ لو ظهر في تركة الميت ورقة بخطه أن ملكه الفلاني وقف و أنه وقع القبض و الاقباض لم يحكم بوقفيته بمجرده ما لم يحصل العلم أو الاطمئنان به، لاحتمال أنه كتب ليجعله وقفاً كما يتفق ذلك كثيراً.

property without the intention of setting it off out the income of the trust, he shall not be allowed to do so subsequently.

Problem # 92. A trusteeship is established by its notoriety in a way that leads to its knowledge and satisfaction; or by the acknowledgement of the possessor of his heirs after his death; or the object of trust may be in possession of the trust and others may be having transactions with it as with an object of trust without anybody having any objection; and by means of legal evidence.

Problem # 93. If person acknowledges of making a trust, but later claims that he had done so for some consideration, his word shall be entertained, but he shall be required to establish his claim if there is a competent person challenging his claim, contrary to the case when the contract for the trust is concluded, and delivery takes place, and then he claims that he did not intend to make the trust, in which case his word shall not be entertained at all, as is the case in all contracts and agreements.

Problem # 94. As the transactions made by people with the object of trusts is a proof of the trusteeship itself as long as it is not proved otherwise, likewise the nature and manner of their acts relating to their acting respectively or jointly or consumption, or the like shall also be a proof of its subsistence, and action shall be taken accordingly unless knowledge to the contrary is not obtained.

Problem # 95. If a property is in the possession of a person who makes changes in it as his own property, but later it transpires that it had been a trust in the past, it shall not be snatched from him simply due to the information as long as its being a trust at present is not established. Likewise, if a person claims that the property had been made a trust for his ancestors for generation after generation, and also establishes it, without proving its being a trust at present. If the possessor of the property admits against the claim of his opponent that it was an object of a trust, but it was declared lawful for sale, and he had purchased it, the legality of his possession shall terminate and the property shall be taken away from him, and he shall be required to establish the lawfulness of its sale and the purchase having taken place.

Problem # 96. If a book, a copy of the Qur'ān, etc, is in the possession of a person, and he claims to be its owner, and it is written on it that it was an object of trust, judgement shall not be given in favour of its being an object of trust merely on the ground of the writing, and it can be purchased from him. Of course, apparently in such case there shall be a blemish and defect in the transaction, and if the matter has been kept secret from the buyer, he shall have the right of option (to accept it or terminate it).

Problem # 97. If in the property of a deceased a document in his own writing appears saying that such property of his is a trust, and that its delivery and receipt have taken place, it shall not be declared a trust merely on this ground, and it shall not entail full knowledge and satisfaction, with the possibility that

مسألة ٩٨ ـ إذا كانت العين الموقوفة من الأعيان الزكوية كالأنعام الثلاثة لم يجب على الموقوف عليهم زكاتها و إن بلغت حصة كل منهم النصاب، و أما لو كانت نماؤها منها كالعنب و التمر ففي الوقف الخاص وجبت الزكاة على كل من بلغت حصته النصاب من الموقوف عليهم، لأنها ملك طلق لهم بخلاف الوقف العام حتى مثل الوقف على الفقراء، لعدم كونه ملكاً لواحد منهم إلا بعد قبضه، نعم لو أعطي الفقير مثلاً حصة من الحاصل على الشجر قبل وقت تعلق الزكاة بتفصيل مر في كتاب الزكاة وجبت عليه لو بلغت النصاب.

مسألة ٩٩ ـ الوقف المتداول بين بعض الطوائف ـ يعمدون إلى نعجة أو بقرة و يتكلمون بألفاظ متعارفة بينهم و يكون المقصود أن تبقى و تذبح أولادها الذكور و تبقى الاناث و هكذا ـ الظاهر بطلانه لعدم تحقق شرائط صحته.

خاتمة:

تشتمل على أمرين: أحدهما في الحبس و ما يلحق به، ثانيهما في الصدقة.

القول في الحبس وأخواته

مسألة ١ ـ يجوز للشخص أن يحبس ملكه على كل ما يصح الوقف عليه، بأن تصرف منافعه فيما عيّنه على ما عيّنه، فلو حبسه على سبيل من سبل الخير و محال العبادات مثل الكعبة المعظمة و المساجد و المشاهد المشرفة فان كان مطلقا أو صرح بالدوام فلا رجوع بعد قبضه و لا يعود إلى ملك المالك و لا يورث، و إن كان إلى مدة لا رجوع إلى انقضائها، و بعده يرجع إلى المالك أو وارثه، ولو حبسه على شخص فان عين مدة أو مدة حياته لزم الحبس في تلك المدة، ولو مات الحابس قبل انقضائها يبقى على حاله إلى أن تنقضي، و إن أطلق و لم يعيّن وقتاً

the person has written it in order to make it a trust, as in most cases it so happens.

Problem # 98. If the endowed property belongs to the category liable to Zakāt is charged as the three quadrupeds [namely, camels, cows and sheep], the donees shall not be bound to pay its Zakāt, even if the share of all of them reaches the limit liable to Zakāt. If, however, the produce of the endowed property is such that it is liable to Zakāt, as grapes and dates, then, in case of special endowments, Zakāt shall be charged on the share of each person from among the donees that reaches the limit liable to Zakāt, as it is their free or unrestrained property as opposed to the public endowment including even the endowment for the poor due to its not being the property of any single person from among them exccpt after its possession. Of course, if a poor person is paid a share, for example, out of the produce of a tree before it becomes liable to Zakāt, according to the details already mentioned in the Section on Zakāt, Zakat shall be payable on it if it has reached the limit liable to Zakāt.

Problem # 99. There is a system prevalent among some tribes concerning the (female) sheep or cows according to which they utter some words common among them by which they mean that the females [from among the said animals] shall be left and their male offspring shall be slaughtered leaving the female ones. Such endowment is apparently void due to non-fulfilment of the conditions of its validity.

CONCLUSION

The Conclusion consists of two subjects, one being the Confinement (*Habs*) and its Adjuncts, and the other being Charity (*Ṣadaqah*).

I – Chapter One - Confinements (*Habs*) and its Adjuncts

Problem # 1. It is lawful for a person to confine his property for which an endowment is valid, so that its income may be spent for purpose specified by him. If he confines it for any of the charitable purposes or the places of worship like the Holy Ka'bah, mosques, or holy mausoleums, then if its period is left unmentioned or it has been explicitly mentioned as for ever, it shall not be revoked after its delivery and shall not again become a property of its owner, [i.e. the endower]. Nor shall it be inherited [by his heirs]. If it is meant for a limited period, its period shall not be revocable until its maturity, after which it shall again become a property of the [original] owner or his heir. If he confines it for a person, then in case he has specified a particular period or for his lifetime, it shall be binding until that period. If the confiner dies before its maturity, it shall remain intact until its maturity. If he has left the period unmentioned and has

لزم مادام حياة الحابس، فان مات كان ميراثاً، و هكذا الحال لو حبس على عنوان عام كالفقراء، فان حدده. بوقت لزم إلى انقضائه، و إن لم يوقت لزم مادام حياة الحابس.

مسألة ٢ ـ لو جعل لأحد سكنى داره مثلاً بأن سلطه على إسكانها مع بقائها على ملكه يقال له: السكنى، سواء أطلق ولم يعيّن مدة كأن يقول: «أسكنتك داري» أو «لك سكناها» أو قدّره بعمر أحدهما كما إذا قال: «لك سكنى داري مدة حياتك» أو مدة حياتي، أو قدّره بالزمان كسنة و سنتين مثلاً، نعم لكل من الأخيرين اسم يختص به، و هو العمرى في أولها و الرقبى في الثاني.

مسألة ٣ ـ يحتاج كل من الثلاثة إلى عقد مشتمل على إيجاب من المالك وقبول من الساكن، فالايجاب كل ما أفاد التسليط المزبور عرفاً كأن يقول في السكنى: «أسكنتك هذه الدار» أو «لك سكناها» و ما أفاد معناهما بأيّ لغة كان، و في العمرى باضافة مدة حياتي أو حياتك، و في الرقبى باضافة سنة أو سنتين مثلاً، و للعمرى و الرقبى لفظان آخران، فللأولى أعمرتك هذه الدار عمرك أو عمري أو ما بقيت أو بقيت أو ما عشت أو عشت و نحوها، و للثانية أرقبتك مدة كذا، و القبول كل ما دل على الرضا بالايجاب.

مسألة ٤ ـ يشترط في كل من الثلاثة قبض الساكن، و هل هو شرط الصحة أو اللزوم؟ و جهان لا يبعد أولها، فلو لم يقبض حتى مات المالك بطلت كالوقف على الأظهر.

مسألة ٥ ـ هذه العقود الثلاثة لازمة يجب العمل بمقتضاها، و ليس للمالك الرجوع و إخراج الساكن، ففي السكنى المطلقة حيث ان الساكن استحق مسمى الاسكان ولو يوماً لزم العقد في هذا المقدار، و ليس للمالك منعه عنه، و له الرجوع في الزائد متى شاء، و في العمرى و الرقبى لزم بمقدار التقدير، و ليس له إخراجه قبل انقضائه.

مسألة ٦ ـ لو جعل داره سكنى أو عمرى أو رقبى لشخص لم تخرج عن ملكه،

not specified any period, it shall be binding during his lifetime, so that if he dies it shall be a part of his inheritance. The same shall be the case if he confines it for some public purpose, as for the poor, so that if he has limited it for a period, it shall be binding for that period. If he does not limit for a specified period, it shall be binding during his lifetime.

Problem # 2. If a person confines, for example, residence in his house for a person retaining its ownership for himself, in legal terminology it is called "*Suknā*" (or the right of residence), irrespective of the fact that its period is unmentioned and no period is specified, as when he says: "I have granted you (the right of) residence", or "You are entitled to residence in it", or may limit during the lifetime of either of them, as when he says : " You have the (right of) residence in my house during your lifetime" or during my lifetime, or limits it to a period of time as, for example, for a year or two. It is called "*'Umrā*" in the first case and "*Ruqbā*" in the second.

Problem # 3. In all the three types of confinement, [namely, *Suknā*, *'Umrā* and *Ruqbā*], a contract is required consisting of Declaration by the master and Acceptance by the one having residence. The Declaration may be expressed by words denoting said entitling another to residence according to the prevalent custom, as when he says: "I have granted you [right of] residence in this house," or "You have the [right of] residence in it," or whatever conveys such sense in any language whatever. In case of an "*'Umrā*" there must be an addition of the words "During my lifetime" or "During your lifetime. In a "*Ruqbā*", the words, for example, for a year or two must be added. For an "*'Umrā*" or "*Ruqbā*" there are two other words, so that for the former, the words are: "I have given as *'Umrā* this house to you for my lifetime or your lifetime," or "as long as I survive, or you survive", or "as long as I am alive or you are alive", or the like. For the latter, the words are: "I have given you as *Ruqbā* for such period of time". The Acceptance may be expressed in whatever words that convey the consent with the Declaration.

Problem # 4. In all the above three types of confinement, possession must take place. Whether it is a condition for the validity of the confinement or a mere necessity, there are two alternatives, the former being not far from being preferable. If possession has not taken place until the master's death, according to the opinion in conformity with the traditional authority the confinement shall be rendered invalid.

Problem # 5. All these three types of confinement are binding, and it is obligatory to fulfil all their requirements, and the master [or the confiner] is not entitled to revoke it or expel the person entitled to residence. In case of a mere *Suknā*, in which a person is entitled to what is called residence, even for a day, the contract shall be binding for that period, and the master shall not be entitled to deny it. But in case of period exceeding the one mentioned in the contract, he may revoke the contract whenever he likes. But in case of *'Umrā* and *Ruqbā* , the contract is binding for the specified period, and the owner cannot expel the person whom he has granted the right of residence.

Problem # 6. If a person has granted residence to another by way of *Suknā*, *'Umrā* or *Ruqbā*, the property shall not cease to be his property, and he shall be entitled to sell it, without any of the three

و جاز بيعها، و لم تبطل العقود الثلاثة، بل يستحق الساكن السكنى على النحو الذي جعلت له، و كذا ليس للمشتري إبطالها، ولو كان جاهلاً فله الخيار بين فسخ البيع و إمضائه بجميع الثمن، نعم في السكنى المطلقة بعد مقدار المسمى يبطل العقد و ينفسخ إذا أريد بالبيع فسخه و تسليط المشتري على المنافع، فحينئذ ليس للمشتري الخيار.

مسألة ٧ - لو جعلت المدة في العمرى طول حياة المالك و مات الساكن قبله كان لورثته السكنى إلى أن يموت المالك، ولو جعلت طول حياة الساكن و مات المالك قبله ليس لورثته إخراج الساكن طول حياته، ولو مات الساكن ليس لورثته السكنى إلا إذا جعل له السكنى مدة حياته و لعقبه بعد وفاته فلهم ذلك، فاذا انقرضوا رجعت إلى المالك أو ورثته.

مسألة ٨ - هل مقتضى العقود الثلاثة تمليك سكنى الدار، فيرجع إلى تمليك المنفعة الخاصة، فله استيفاؤها مع الاطلاق بأيّ نحو شاء منْ نفسه و غيره مطلقا ولو أجنبياً، و له إجارتها و إعارتها، و تورث لو كانت المدة عمر المالك و مات الساكن دون المالك، أو مقتضاها الإلتزام بسكونة الساكن على أن يكون له الانتفاع و السكنى من غير أن تنتقل إليه المنافع، و لازمه عند الاطلاق جواز إسكان من جرت العادة بالسكنى معه كأهله و أولاده و خادمه و خادمته و مرضعة ولده وضيوفه، بل و كذا دوابه إن كان الموضع معداً لمثلها، و لا يجوز أن يسكن غيرهم إلا أن يشترط ذلك أو رضي المالك و لا يجوز أن يؤجر المسكن و يعيره، و يورث هذا الحق بموت الساكن، أو مقتضاها نحو إباحة لازمة، و لازمه كالاحتمال الثاني إلا في التوريث، فان لازمه عدمه؟ و لعل الأول أقرب خصوصاً في مثل «لك سكنى الدار» و كذا في العمرى و الرقبى، و مع ذلك لا تخلو المسألة من إشكال.

مسألة ٩ - كل ما صح وقفه صَح إعماره من العقار و الحيوان والأثاث و غيرها، و الظاهر أن الرقبى بحكم العمرى، فتصح فيما يصح الوقف و أما السكنى

contracts to be declared cancelled; rather the person residing in it shall be entitled to reside in it as he has been entitled to, and so the buyer shall not be entitled to revoke the contract. In case he was ignorant of the fact, the buyer shall have the option either to revoke the sale or endorse it, and receive the whole amount he has paid to the seller. Of course, in case of a mere *Suknā* contract, it shall be cancelled after the expiry of the period mentioned in it. It can be revoked by means of the contract for sale whenever desired by entitling the buyer to the benefits of the property, in which case the buyer shall have no option [to revoke the contract for sale or endorse it].

Problem # 7. If in a *'Umrā* confinement the period specified is the lifetime of the owner, and the person granted the right to residence dies, his heirs shall be entitled to residence till the death of the owner. If the period specified in the confinement is lifetime of the person entitled to residence, and the confiner dies, his heirs shall not be entitled to expel the person entitled to residence during his lifetime. If the person entitled to residence dies, his heirs shall not be entitled to residence, except when the contract entitles him to residence during his lifetime and his heirs after his death, in which case his heirs shall be entitled to residence. In case of their demise, the house shall revert to the master or his heirs.

Problem # 8. Whether the requirement of the three types of confinement is the ownership of residence of the house, so that it entails the special benefit of residence, and so the person entitled to residence is entitled to enjoy the right of residence in whatever manner he likes whether by himself or by any other person without any restriction even if he were a stranger, and he is entitled to lease it on rent or by way of *'Āriyah*, and the right would be inherited by his heirs if the period were the lifetime of the owner and the person entitled to residence dies before the death of the owner, or its requirement is his obligatory entitlement to residence that he may enjoy it and have residence without being entitled to its benefits, or it requires without any restriction the right of residence according to the prevalent custom entailing along with himself the residence of his wife, children, servants, maid-servants, his children's nurse and his guests, rather even his beasts of burden if the place is prepared for such purpose, and it is not permissible for him to provide residence to others than these persons except when he stipulates it [in the contract] or the owner agrees to it, but it is not permissible for him to rent out the house or gives it by way of *'Āriyah*, [without] its right being inherited after his own death, or their requirement is the binding permission, entitling him to what is mentioned in the second likelihood except the right of inheritance entailing the absence of it ? Probably the first is closer to the traditional authority, particularly when the words of the contract are: "You are entitled to residence in the house." The same rule shall apply in case of *'Umrā* and *Ruqbā* . In spite of all this, the problem is not free from ambiguity.

Problem # 9. Whatever can be made a subject of endowment like real estates, animals and persons, etc. can also be made a subject of *'Umrā*. Apparently a *Ruqbā* is governed by the same laws as an *'Umrā*, and it is also valid for what can be the subject of endowment. However, as regards a *Suknā* confinement, it is confined to the houses only.

فيختص بالمساكن.

القول في الصدقة

قد وردت النصوص الكثيرة على ندبها و الحث عليها خصوصاً في أوقات مخصوصة، كالجمعة و عرفة و شهر رمضان، و على طوائف مخصوصة كالجيران و الأرحام حتى ورد في الخبر «لا صدقة و ذو رحم محتاج» و عن رسول الله صلى الله عليه و آله «إن الله لا إله إلا هو ليدفع بالصدقة الداء والدبيلة و الحرقة و الغرق و الهدم و الجنون ـ وعدّ سبعين باباً من السوء ـ ...» و قد ورد «أن الافتتاح بها في اليوم يدفع نحس يومه و في الليلة يدفع نحسها» و «أن صدقة الليل تطفيء غضب الرب و تمحو الذنب العظيم و تهون الحساب و صدقة النهار تثمر المال و تزيد في العمر» و «ليس شيء أثقل على الشيطان من الصدقة على المؤمن، و هي تقع في يد الربّ تبارك و تعالى قبل أن تقع في يد العبد» و عن علي بن الحسين عليه السلام «كان يقبّل يده عند الصدقة فقيل له في ذلك، فقال: إنها تقع في يدالله قبل أن تقع في يد السائل» و نحوه عن غيره عليه السلام، و عن النبي صلى الله عليه و آله «كل معروف صدقة إلى غني أو فقير، فتصدقوا ولو بشق التمرة، و اتقوا النار ولو بشق التمرة، فان الله يربيها لصاحبها كما يربي أحدكم فلوه أو فصيله حتى يوفيه إياها يوم القيامة و حتى يكون أعظم من الجبل العظيم» إلى غير ذلك.

مسألة ١ ـ يعتبر في الصدقة قصد القربة، و لا يعتبر فيها العقد المشتمل على الايجاب و القبول على الأقوى، بل يكفي المعاطاة، فتتحقق بكل لفظ أو فعل من إعطاء أو تسليط قصد به التمليك مجاناً مع نية القربة، و يشترط فيها الاقباض و القبض.

مسألة ٢ ـ لايجوز الرجوع في الصدقة بعدالقبض و إن كانت على أجنبي على الأصح.

Chapter Two - Charity (*Ṣadaqah)*

Several traditions have come down regarding the approbation of *Ṣadaqah* laying emphasis on it, particularly on special occasions, as on Fridays, *'Arafah* and the month of Ramaḍān, for special groups of persons as the neighbours and the kindred, so that it has been reported in a Tradition [that says]: "There is no charity [to be paid to others], when one's own kindred are indigent]." It has been reported from the Prophet of Allāh, May Allāh send Blessings on him and his Progeny, [that he has said:] "Allāh, and there is god but He, certainly drives away through *Ṣadaqah* disease, internal ailment, fire, drowning, being buried under debris, lunacy, - and enumerated seventy types of evils."

It has also been reported [in a tradition] : " Starting the day with it [i.e., *Ṣadaqah*] drives away the calamities of the day, and at night it drives away the calamities of the night", and that " The *Ṣadaqah* at night extinguishes the wrath of the Sustainer [i.e. Allāh], obliterates major sins, turns the Reckoning easy, while the *Ṣadaqah* in the day multiplies the property and lengthens one's life." And [there is another Tradition saying:]"There is nothing heavier upon the Devil than *Ṣadaqah* p[aid to a believer. It reaches the Hands of the Sustainer before it reaches the hands of a human being."

It has been reported about (Imām) 'Alī b. Ḥusayn, A.S., that he used to kiss his hand before paying *Ṣadaqah*, so he was asked about its reason, to which he replied : " It reaches the Hands of Allāh before it reaches the hands of the beggar."

Likewise there is another report from another (Imām), Peace be upon him. It has also been reported from the Prophet, May Allāh send Blessings on him and his Progeny,[that he has said :] " Every good deed is a *Ṣadaqah* whether it is done to a rich person or a poor person. So pay *Ṣadaqah* even if it is in the form of half a dates, and save yourself from the Fire [of Hell] even by means of half a dates. Allāh sustains it as any one of you sustains a foal or a weaned foal until it pays it off on the Day of Resurrection and until it becomes higher than a high mountain." There are also other Traditions on the same subject.

Problem # 1. It is a condition in a *Ṣadaqah* that it must be paid with the intention of seeking closeness [to Allāh]. According to the stronger opinion, there is no condition of its being a contract comprising Declaration and Acceptance, and it is sufficient to be made by way of a *Mu'āṭāt*, and takes place by means of any words or acts signifying bestowing or giving occupation intending thereby to give ownership gratis with the intention of seeking closeness [to Allāh]. There is, however, in it the condition of delivering and taking possession.

Problem # 2. In a *Ṣadaqah* a return is not permissible after the [giving and taking] possession have taken place, even if it has been made to a stranger, according to the more valid opinion.

مسألة ٣ - تحل صدقة الهاشمي لمثله و لغيره مطلقا حتى الزكاة المفروضة و الفطرة، و أما صدقة غير الهاشمي للهاشمي فتحل في المندوبة و تحرم في الزكاة المفروضة و الفطرة، و أما غيرهما من المفروضات كالمظالم و الكفارات و نحوهما فالظاهر أنها كالمندوبة و إن كان الأحوط عدم إعطائهم لها و تنزههم عنها.

مسألة ٤ - يعتبر في المتصدق البلوغ و العقل و عدم الحجر لفلس أوسفه، فلا تصح صدقة الصبي حتى من بلغ عشراً.

مسألة ٥ - لا يعتبر في المتصدق عليه في الصدقة المندوبة الفقر و لا الايمان و لا الاسلام، فتجوز على الغني و على الذمي و المخالف و إن كانا أجنبيين، نعم لا تجوز على الناصب و لا على الحربي و إن كانا قريبين.

مسألة ٦ - الصدقة سراً أفضل، فقد ورد «أن صدقة السر تطفىء غضب الربّ و تطفىء الخطيئة كما يطفىء الماء النار و تدفع سبعين باباً من البلاء» نعم لو اتهم بترك المواساة فأراد دفع التهمة عن نفسه أو قصد اقتداء غيره به لا بأس بالاجهار بها و لم يتأكد إخفاؤها، هذا في المندوبة، وأما الواجبة فالأفضل إظهارها مطلقا.

مسألة ٧ - يستحب المساعدة و التوسط في إيصال الصدقة، فعن النبي صلى الله عليه و آله في خطبة له «و من تصدق بصدقة عن رجل الى مسكين كان له مثل أجره، ولو تداولها أربعون ألف انسان ثم وصلت الى المسكين كان لهم أجر كامل، وما عندالله خير و أبقى للذين اتقوا و أحسنوا لو كنتم تعلمون».

مسألة ٨ - يكره كراهة شديدة أن يتملك من الفقير ما تصدق به بشراء أو اتهاب أو بسبب آخر بل قيل بحرمته، نعم لا بأس بأن يرجع اليه بالميراث.

مسألة ٩ - يكره رد السائل ولو ظن غناه، بل يعطى ولو شيئاً يسيراً.

مسألة ١٠ - يكره كراهة شديدة السؤال من غير احتياج، بل مع الحاجة أيضاً، بل قيل بحرمة الأول، و لا ينبغي ترك الاحتياط، و قد ورد فيه الازعاج الأكيد، ففي الخبر «من سأل الناس و عنده قوت ثلاثة أيام لقي الله يوم القيامة و ليس على وجهه لحم».

Problem # 3. The payment of *Ṣadaqah* of a Hāshimite to a Hāshimite or a non-Hāshimite is absolutely lawful whether it is an obligatory Zakāt or Fiṭrah. But the *Ṣadaqah* of a non-Hāshimite is lawful for a Hāshimite as far as the approved *Ṣadaqah* is concerned, but as regards the obligatory Zakāt and Fiṭrah it is unlawful [for a Hāshimite]. As regards the other types of obligatory *Ṣadaqah* as the *Maẓālim* and expiatory *Ṣadaqah* and the like, apparently they are treated at par with the approved one, although it is more cautious not to pay them to the Hāshimites and for the Hāshimites to abstain from them.

Problem # 4. One paying*Ṣadaqah* must be an adult, sane and not interdicted due to insolvency or idiocy. So it is not lawful for a child to pay *Ṣadaqah*, even if he has attained ten years of age.

Problem # 5. It is not a condition for person receiving an approved *Ṣadaqah* to be indigent, a *Mu'min* [i.e. a Shī'ah] or a Muslim, and it is lawful even if he is a rich person, a *Dhimmī* or one belonging to the opponent sect [i.e., a Sunnī], even if they are strangers. Of course, it s not lawful if he happens to be a *Nāṣib*, or a *Ḥarbī*, even if they are close relatives.

Problem # 6. It is preferable to pay *Ṣadaqah* privately, as a Tradition that has come down says: "A *Ṣadaqah* paid privately extinguishes the wrath of the Sustainer and extinguishes sins as water extinguishes fire, and guards against seventy types of calamities." Of course, if a person is accused of lack of kindness to fellow-beings, and he intends to remove such accusation or has some other purpose, there is no objection if he pays the *Ṣadaqah* openly and does not intend to keep it secret. This is the case with an approved *Ṣadaqah*. As regards the obligatory one, it is preferable to pay it openly in all circumstances.

Problem # 7. It is approved to provide assistance and means for taking the *Ṣadaqah* [to the receiving person]. Hence there is the Tradition from the Prophet, PBUH, who has said: "Whosoever provides means for giving the *Ṣadaqah* to the poor shall have a similar reward for it. Even if forty thousand persons busy themselves in it and then the *Ṣadaqah* reaches the poor, they shall have a full reward. There is with Allāh an everlasting reward for those who exercise *Taqwā* and do good to others, if you do understand it."

Problem # 8. It is extremely abominable to become owner of what has been paid as a *Ṣadaqah* to the poor by means of purchasing it, or in the form of *Hibah*, or any other means. Rather it is declared as forbidden. Of course, there is no objection if a person gets it by way of inheritance.

Problem # 9. It is abominable to turn away a beggar, even if it is under the impression that the beggar is a rich person. Rather he must be paid something, even if it is small.

Problem # 10. It is extremely abominable to beg without any need; rather even when in need. Rather it is declared forbidden. So caution must not be given up. It is reported as strictly forbidden. So a Tradition says: "Whosoever begs of people while he has food for three days, on the Day of Resurrection he shall meet Allāh without having flesh on his face."

كتاب الوصية

و هي إما تمليكية كأن يوصي بشيء من تركته لزيد، و يلحق بها الايصاء بالتسليط على حق، و إما عهدية كأن يوصي بما يتعلق بتجهيزه أو باستيجار الحج أو الصلاة أو نحو هما له، و إما فكية تتعلق بفك ملك كالايصاء بالتحرير.

مسألة ١ - إذا ظهرت للانسان أمارات الموت يجب عليه إيصال ما عنده من أموال الناس من الودائع و البضائع و نحوها إلى أربابها، و كذا أداء ما عليه خالقياً كقضاء الصلوات و الصيام و الكفارات و غيرها، أو خلقياً إلا الديون المؤجلة، ولو لم يتمكن من الإيصال و الاتيان بنفسه يجب عليه أن يوصي بإيصال ما عنده من أموال الناس إليهم، و الاشهاد عليها خصوصاً إذا خفيت على الورثة، و كذا بأداء ما عليه من الحقوق المالية خلقياً كالديون والضمانات و الديات و أروش الجنايات أو خالقياً كالخمس و الزكاة و الكفارات و نحوها، بل يجب عليه أن يوصي بأن يستأجر عنه ما عليه من الواجبات البدنية مما يصح فيها الاستيناب و الاستئجار كقضاء الصلاة و الصوم ان لم يكن له ولي يقضيها عنه، بل ولو كان له ولي لا يصح منه العمل أو كان ممّن لا يوثق باتيانه أو يرى عدم صحة عمله.

مسألة ٢ - إن كان عنده أموال الناس أو كان عليه حقوق و واجبات لكن

SECTION THIRTY

A WILL OR BEQUEST (*WAṢIYYAT*)

A Will or a Bequest (*Waṣiyyat)* is either a Proprietary Will, through which the testator bequeaths anything out of his inheritance to Zayd, and to this is appended the will for giving over a right; or it is a Mandatory Will by which a testator commissions another with the duty of arranging his funeral or hiring someone for the performance of Ḥajj or prayers, or the like, on his behalf; or it is meant for disengaging his property through which he may emancipate a slave.

Problem # 1. When the symptoms of death appear for a person he is bound to return to their masters all the things belong to other people lying with him as the deposits or things entrusted to his custody, commodities, or the like.

So also he must pay what he owes to his Creator as the prayers, fasts, expiations, etc., due to him, or owed to His creatures [or human beings] except the delayed debts.

If he is not able to return them personally, he is bound to make a will for returning all the things belonging to other people and testify them through witnesses, particularly when they had been kept secret from the heirs.

Likewise, he is bound to pay off whatever proprietary rights he owes to the human beings as the debts, guarantees, *Diyāt,* and compensations for offences, or what he owes to his Creator (Allāh) like Khums, Zakāt, expiations (*Kaffārāt*), or the like.

Rather it is obligatory on him to make a will for hiring persons for the performance of what is due to be performed physically as far as it is allowed to employ agents or hired persons for their performance like offering due prayers and fasts if he has no *Walī* to perform them; rather, even when he has a *Walī* but their performance by him is not valid, or is one who cannot be trusted for their performance or he does not consider their performance by him to be valid.

Problem # 2. If he has with him things belonging to others or he owes others' rights or dues but he knows and is satisfied that his heirs shall return the belongings of others to them and fulfil the rights and pay the dues, he shall not be bound to return them or make a will for them, although it is more cautious and preferable to do so.

يعلم أو يطمئن بأن أخلافه يوصلون الأموال و يؤدون الحقوق و الواجبات لم يجب عليه الايصال و الايصاء و إن كان أحوط و أولى.

مسألة ٣ ـ يكفي في الوصية كل مادل عليها من الألفاظ من أيّ لغة كان، و لا يعتبر فيها لفظ خاص، ففي التمليكية يقول: «أوصيت لفلان بكذا» أو أعطوا فلاناً أو ادفعوا إليه بعد موتي أو لفلان بعد موتي كذا و نحوها بأيّ نحو يفيد ذلك، و في العهدية افعلوا بعد موتي كذا و كذا، و الظاهر الاكتفاء بالكتابة حتى مع القدرة على النطق خصوصاً في الوصية العهدية إذا علم أنه كان في مقام الوصية و كانت العبارة ظاهرة الدلالة على المعنى المقصود، فيكفي وجود مكتوب من الموصي بخطه و إمضائه أو خاتمه إذا علم من قرائن الأحوال كونه بعنوان الوصية، فيجب تنفيذها، بل الاكتفاء بالاشارة المفهمة حتى مع القدرة على النطق أو الكتابة لا يخلو من قوة و إن كان الأحوط عدم الايصاء بها اختياراً.

مسألة ٤ ـ للوصية التمليكية أركان ثلاثة: الموصي و الموصى به و الموصى له، و قوام العهدية بأمرين: الموصي و الموصى به، نعم إذا عين الموصي شخصاً لتنفيذ ها تقوم حينئذ بأمور ثلاثة: هما و الموصى إليه، و هو الذي يطلق عليه الوصي.

مسألة ٥ ـ لا إشكال في أن الوصية العهدية لاتحتاج إلى قبول، نعم لو عيّن وصياً لتنفيذها لابد من قبوله لكن في وصايته لا في أصل الوصية و أما الوصية التمليكية فان كانت تمليكاً للنوع كالوصية للفقراء و السادة فهي كالعهدية لا يعتبر فيها القبول، و إن كانت تمليكاً للشخص فالمشهور على أنه يعتبر فيها القبول من الموصى له، و الظاهر أن تحقق الوصية و ترتب أحكامها من حرمة التبديل و نحوها لا يتوقف على القبول، لكن تملك الموصى له متوقف عليه، فلا يتملك قهراً، فالوصية من الايقاعات لكنها جزء سبب للملكية في الفرض.

مسألة ٦ ـ يكفي في القبول كل ما دل على الرضا قولاً أو فعلاً كأخذ الموصى

Problem # 3. It is sufficient in a Will to employ any words signifying it in any language whatsoever, and it is not a condition to use special words in it. So in a Proprietary Will one may says: " I have made a will in favour of such person for such thing," or " give over to such person or pay such thing to such person after my death ", or the like, in whatever way that may convey such sense. In a Mandatory Will, [the words may be :] "Do such and such after my death." Apparently it is sufficient make a will in writing even if he is able to make it orally, particularly in case of a Mandatory Will, when it is known to have been written as a Will, and the words may outwardly convey the purpose intended. Thus it is sufficient if the written document is in the testator's own hand-writing and bears his signatures or his seal. When it is clear from the context that it is a Will, then it shall be obligatory to be enforced. Rather it is not far from being effective if the will is made through signs even in case of ability to make it orally or in writing, although it is more cautious not to make a Will through signs when he is able to do it orally or in writing.

Problem # 4. For a Proprietary Will there are three pillars, namely, the Testator, the Legatee and the Legacy. The Mandatory Will is based on two things, namely, the Testator and the Legatee. Of course, if the Testator has specified the person to execute his Will, it shall be based on three things, namely, the already mentioned two things [i.e., the Testator and the Legatee] and the person who is commissioned to execute the Will, and this the person who is called the Executor (*Waṣī*).

Problem # 5. There is no objection in that in a Mandatory Will an Acceptance is not required. Of course, if an Executor has been specified, an Acceptance by him shall be indispensable, but that shall be an Acceptance of his Executorship, not of the Will itself.

As regards a Proprietary Will, if it is meant to give proprietary rights to a group as the poor or the *Sādāt* (the Sayyid community), then it shall be like a Mandatory Will in so far as an Acceptance shall not be required in it too. If, however, it is meant to give proprietary rights to an individual, then according to the prevalent opinion, there is a condition of Acceptance by the Legatee in it.

Apparently the materialisation of the Will and the application of its laws like the prohibition of changing it, and the like, do not depend on Acceptance [by the Legatee].

The transfer of ownership to the Legatee, however, depends on Acceptance by him, so that the transfer of ownership does not take place forcibly. So a Will is one of the Unilateral Obligations (*Īqā'āt*), but it is a part of the cause for ownership in the obligation.

Problem # 6. Anything expressed in words or by deed that signifies consent is sufficient for Acceptance, as taking hold of the object of Will by the Legatee and making any change in it with the intention of Acceptance.

به و التصرف فيه بقصد القبول.

مسألة ٧ ـ لا فرق بين وقوع القبول في حياة الموصي أو بعد موته كما لا فرق في الواقع بعد الموت بين أن يكون متصلاً به أو متأخراً عنه مدة.

مسألة ٨ ـ لو ردّبعضاً و قبل بعضاً صح فيما قبله و بطل فيما ردّه على الأقوى إلا إذا أوصى بالمجموع من حيث المجموع.

مسألة ٩ ـ لو مات الموصى له في حياة الموصي أو بعد موته قبل أن يصدر منه ردّ أو قبول قام ورثته مقامه في الرد و القبول فيملكون الموصى به بقبولهم كمورثهم لو لم يرجع الموصي عن وصيته.

مسألة ١٠ ـ الظاهر أن الوارث يتلق المال من الموصي ابتداءً لا أنه ينتقل إلى الموصى له أولاً ثم إلى وارثه و إن كانت القسمة بين الورثة مع التعدد على حسب قسمة المواريث، فعلى هذا لا يخرج من الموصى به ديون الموصى له و لا تنفذ فيه وصاياه.

مسألة ١١ ـ إذا قبل بعض الورثة وردّ بعضهم صحت الوصية فيمن قبل و بطلت فيمن ردّ بالنسبة.

مسألة ١٢ ـ يعتبر في الموصي البلوغ و العقل و الاختيار و الرشد، فلا تصح وصية الصبي، نعم الأقوى صحة وصية البالغ عشراً إذا كانت في البر و المعروف كبناء المساجد و القناطر و وجوه الخيرات و المبّرات، و كذا لا تصح وصية المجنون ولو أدوارياً في دور جنونه، و لا السكران و لا المكره و لا المحجور عليه إذا كانت متعلقة بالمال المحجور فيه.

مسألة ١٣ ـ يعتبر في الموصي مضافاً إلى ما ذكر أن لا يكون قاتل نفسه متعمداً، فمن أوقع على نفسه جرحاً أو شرب سماً أو ألقى نفسه من شاهق و نحو ذلك مما يقطع أو يظن كونه مؤدياً إلى الهلاك لم تصح وصيته المتعلقة بأمواله، وإن كان إيقاع ما ذكر خطأ أو كان مع ظن السلامة فاتفق موته به نفذت وصيته، ولو أوصى ثم أحدث في نفسه ما يؤدي إلى هلاكه لم تبطل وصيته و إن كان

Problem # 7. It makes no difference whether the Acceptance is made during the lifetime of the Testator or after his death, as also in case it takes place after the Testator's death, it makes no difference whether it takes place simultaneously with the Testator's death or subsequently after some time.

Problem # 8. It shall be lawful for the Legatee to reject part of the Will and accept it partially. So, according to the stronger opinion, it shall be valid as far as it is accepted by him and invalid as far as it is rejected by him, except when the Testator has made a whole Will for the entire Legacy.

Problem # 9. If the Legatee dies during the lifetime of the Testator, or after his death, before declaring his rejection or Acceptance, his heirs shall succeed him in making the rejection or Acceptance, and shall own the Legacy by their Acceptance in the same way as their propositus (*Mūrith*), in case the Testator has not already revoked his Will.

Problem # 10. Apparently the heirs shall initially get the delivery of the Legacy from the Testator, and not that it is first to be transferred to the Legatee and then to his heirs, even if in case of several heirs the division among them shall take place on the basis of the division of all the inherited properties, and, therefore, the Testator's debts shall not be deducted from the Legacy, and his Wills shall not be enforced from it.

Problem # 11. If a Legatee has accepted part of the Will and rejected it partially, the Will shall be valid as far it has been accepted by him and shall be invalid as far as it has been rejected by him proportionately.

Problem # 12. It is a condition for the Testator that he must be adult, sane, having free will and maturity, so that a Will made by a child is not valid. Of course, according to the stronger opinion, a Will made by a child who has attained ten years of age is valid if it is made for pious or charitable purposes as the construction of mosques, bridges, righteous and charitable institutions. Likewise, a Will made by a lunatic is not valid even if the lunacy is intermittent and it is made during the attack of insanity. Nor is it valid if made by an intoxicated person, or made under duress or by an interdicted person provided the Will concerns the property to which his interdiction applies.

Problem # 13. In addition to what has already been mentioned, it is also a condition for the Testator that he must not have murdered any person wilfully. So if a person has wounded himself, or drunk poison, or thrown himself from a high place, or the like, in which it is certain or assumed to lead to death, a Will by him in respect of his property shall not be valid. If what has been mentioned takes place by mistake or under the impression of being safe but has ensued incidentally, his Will shall be enforced. . If, however, he makes a will and subsequently commits an act that leads to his death, his Will shall not

حين الوصية بانياً على أن يحدث ذلك بعدها.

مسألة ١٤ ـ لا تبطل الوصية بعروض الأغماء و الجنون للموصي و إن بقيا إلى حين الممات.

مسألة ١٥ ـ يشترط في الموصى له الوجود حين الوصية، فلا تصح للمعدوم كالميت أو لما تحمله المرأة في المستقبل و لمن سيوجد من أولاد فلان و تصح للحمل بشرط وجوده حين الوصية و إن لم تلجه الروح، و إنفصاله حياً، فلو انفصل ميتاً بطلت و رجع المال ميراثاً لورثة الموصي.

مسألة ١٦ ـ تصح الوصية للذمي و كذا للمرتد الملي إن لم يكن المال مما لا يملكه الكافر كالمصحف، و في عدم صحتها للحربي و المرتد الفطري تأمل.

مسألة ١٧ ـ يشترط في الموصى به في الوصية التمليكية أن يكون مالاً أو حقاً قابلاً للنقل كحق التحجير و الاختصاص، من غير فرق في المال بين كونه عيناً أو ديناً في ذمة الغير أو منفعة، و في العين بين كونها موجودة فعلاً أو مما ستوجد، فتصح الوصية بما تحمله الدابة أو يثمر الشجر في المستقبل.

مسألة ١٨ ـ لابد و أن تكون العين الموصى بها ذات منفعة محللة مقصودة حتى تكون مالاً شرعاً، فلا تصح الوصية بالخمر غير المتخذة للتخليل و الخنزير و آلات اللهو و القمار، ولا بالحشرات و كلب الهراش و نحوها، وأن تكون المنفعة الموصى بها محللة مقصودة، فلا تصح الوصية بمنفعة المغنية و آلات اللهو، و كذا منفعة القردة و نحوها.

مسألة ١٩ ـ لا تصح الوصية بمال الغير و إن أجاز المالك إذا كان الايصاء به عن نفسه بأن جعل مال الغير لشخص بعد وفاة نفسه، و أما عن الغير بأن جعله لشخص بعد وفاة مالكه فلا تبعد صحته و نفوذه بالاجازة.

مسألة ٢٠ ـ يشترط في الوصية العهدية أن يكون ما أوصى به عملاً سائغاً تعلق به أغراض العقلاء، فلا تصح الوصية بصرف ما له في معونة الظلمة و قطاع الطريق و تعمير الكنائس و نسخ كتب الضلال و نحوها، و كذا بصرف المال

thereby be rendered invalid, even if at the time of making the Will he had decided to commit such act subsequently.

Problem # 14. A will is not invalidated as a result of occurrence of unconsciousness or insanity to the Testator, although it continues until his death.

Problem # 15. It is a condition for the Legatee that he must be alive at the time the Will is made. So it is valid to make a Will for a person who does not exist or for one to be born to a woman at a later date or for one to be born to some other person. It is, however, valid to make a will in favour of a foetus if it exists at the time a Will is made, even if soul [or life] is not infused into it, and it is subsequently born alive. If, however, it is subsequently born dead, the Will shall be void, and the property bequeathed shall revert to the Testator's heirs.

Problem # 16. It is lawful to make a will in favour of a *Dhimmi*, and also in favour of a *Murtad al-Milli* [an apostate born of non-Muslim parents if the legacy does not include something that cannot be owned by an infidel, such as a *Muṣḥaf*. As regards its unlawfulness for a *Ḥarbi* or a *Murtad al-Fiṭri* [an apostate born of Muslim parents], there is hesitation in it.

Problem # 17. It is a condition for the legacy in a Proprietary Will that it must be some property or right that is transfer as the right in Interdiction or an Exclusive Right, without there being difference whether the property is real or a debt owed by another or a benefit. In case of a real property there is no difference whether it exists presently or shall be in existence in future. So it is lawful to make a will about a foetus of an animal or the fruits to be borne by a tree in future.

Problem # 18. It is indispensable for a legacy to be of a lawful benefit intended thereby, and even that it must be a lawful property, so that it is not lawful to make a will concerning wine not meant to make vinegar, or a pig, instruments for entertainment or gambling nor concerning worms, fighting dogs, or the like. t is also indispensable] that the benefit intended by the legacy must also be lawful, so that it is not lawful to make a will concerning the benefit to be obtained from a female singer or the instruments of entertainment, or from monkeys , or the like.

Problem # 19. It is not lawful to make a will concerning a property belonging to another, even if the owner has allowed it, in case the will is made on his own behalf, so that he may make the property of another to belong to another after his own death. As regards the will made on behalf of another in favour of a person after the death of its owner, it is not far from being lawful and enforceable with the owner's permission.

Problem # 20. It is a condition for a Mandatory Will that what has been commissioned must be a lawful act meant for reasonable purposes, so that it is not lawful to make a will to spend his property for the support of the tyrants or highway robbers, construction of churches or publishing copies of misguiding books, or the like, or spending the money on useless and absurd purposes.

Problem # 21. If a person makes a will about a thing that is lawful according to himself by way of *Ijtihād*

فيما يكون سفهاً و عبثاً.

مسألة ٢١ ـ لو أوصى بما هو سائغ عنده اجتهاداً أو تقليداً و غير سائغ عندالوصي كما أوصى بنقل جنازته بعد دفنه و هو غير جائز عندالوصي لم يجز له تنفيذها، ولو انعكس الأمر انعكس.

مسألة ٢٢ ـ لو أوصى لغير الولي بمباشرة تجهيزه كتغسيله و الصلاة عليه مع وجود الولي ففي نفوذها و تقديمه على الولي و عدمه وجهان بل قولان، و لا يترك الوصي الاحتياط بالاستئذان من الولي، والولي بالاذن له.

مسألة ٢٣ ـ يشترط في نفوذ الوصية في الجملة أن لا تكون في الزائد على الثلث، و تفصيله أن الوصية إن كانت بواجب مالي كأداء ديونه و أداء ما عليه من الحقوق كالخمس و الزكاة و المظالم و الكفارات يخرج من أصل المال بلغ ما بلغ، بل لو لم يوص به يخرج منه و إن استوعب التركة و يلحق به الواجب المالي المشوب بالبدني كالحج ولو كان منذوراً على الأقوى، و إن كانت تمليكية أو عهدية تبرعية كما إذا أوصى باطعام الفقراء أو الزيارات أو إقامة التعزية و نحو ذلك نفذت بمقدار الثلث، و في الزائد صحت إن أجاز الورثة، و إلا بطلت من غير فرق بين وقوعها في حال الصحة أو المرض، و كذلك إذا كانت بواجب غير مالي على الأقوى. كما لو أوصى بالصلاة و الصوم عنه إذا اشتغلت ذمته بهما.

مسألة ٢٤ ـ لا فرق فيما ذكر بين ما إذا كانت الوصية بكسر مشاع أو بمال معين أو بمقدار من المال، فكما أنه لو أوصى بالثلث نفذت ولو أوصى بالنصف نفذت في الثلث إلا اذا أجاز الورثة كذلك لو أوصى بمال معين كبستانه أو بمقدار معين كألف دينار، فانه ينسب الى مجموع التركة فان لم تزد على ثلث المجموع نفذت، و إلا تحتاج الى اذن الورثة.

مسألة ٢٥ ـ لو كانت اجازة الورثة لما زاد على الثلث بعد موت الموصي نفذت بلا إشكال و ان ردها قبل موته، و كذا لو أجازها قبل الموت و لم يردها بعده، و أما لو ردها بعده، فهل تنفذ الاجازة السابقة ولا أثر للرد بعدها أم لا؟ قولان

or *Taqlīd*, but unlawful according to the Executor, such as for carrying his dead body after his burial that may be unlawful according to the Executor, the latter shall not be obliged to fulfil it, or to the contrary when the case is otherwise.

Problem # 22. If a person makes a will for a person other than the *Walī* to perform his burial personally as washing his dead body or offering prayers on the dead body in the presence of the *Walī*, there are two alternatives or opinions regarding its fulfilment or his precedence over the *Walī*, so that the Executor must not give up caution by obtaining permission from the *Walī* and the *Walī* [should not give up caution] by giving his permission.

Problem # 23. As regards the enforcement of the Will, it is a condition that it must not be for more than one-third of the Legacy. The details of it are as follows, that if the Will concerns some financial obligations as the payment of the Testator's debts, or the fulfilment of the rights on him as Khums, Zakāt, *Maẓālim*, and expiations [*Kaffārāt*], they shall be deducted from the total property no matter how much they are. Rather they shall be deducted from the total Legacy even if the Testator has not made a Will about them, even if it comprehends the whole Legacy, and to them shall be attached the financial obligations having physical involvement as Ḥajj, even if it were of a votive nature, according to the stronger opinion. If it were a Proprietary Will or a Voluntary Mandatory Will as when one makes a will for feeding the poor, or pilgrimages, or observing Mourning [for Imām Ḥusayn], or the like, it shall be enforced up to the amount of one-third of the Legacy. As regards the will for an amount exceeding one-third of the Legacy, it shall be valid if permitted by the heirs; otherwise, it shall be invalid, without there being any difference whether it was made when he was sound, or when he was sick. According to the stronger opinion, the same rule shall apply to the case of non-financial Wills, as when one makes a Will for offering prayers or fasting on his behalf, when he owes them.

Problem # 24. In case of what has been said above, it makes no difference whether the bequest is to be deducted from a joint property, or a definite property, or a part of the property, so that if he has made a Will for one-third of the Legacy, it shall be fulfilled [entirely]. If, however, he makes a will concerning half of the Legacy, it shall be fulfilled up to one-third, except when the heirs allow it to be made for half of the property. If he has made a will concerning a definite property, as his garden, or a definite amount of money as one thousand Dinars, it shall be accounted for out of the total Legacy, so that if it does not exceed one-third of the total Legacy, it shall be fulfilled; otherwise, it shall require the permission of the heirs.

Problem # 25. If the heirs give permission for what exceeds one-third [of the total Legacy] after the death of the Testator, it shall be fulfilled without any problem, even if they have rejected it before the Testator's death. The same shall be the case if they have approved it before the Testator's death and have not rejected it after his death. If they have rejected it after his death, whether the previous approval shall stand, the subsequent rejection shall be ineffective, there are two opinions on this point, the stronger being the former.

أقواهما الأول.

مسألة ٢٦ ـ لو أجاز الوارث بعض الزيادة لا تمامها نفذت بمقدار ما أجاز، و بطلت في الزائد عليه.

مسألة ٢٧ ـ لو أجاز بعض الورثة دون بعضهم نفذت في حق المجيز في الزائد، و بطلت في حق غيره، فاذا كان للموصي ابن و بنت و أوصى لزيد بنصف ماله قسمت التركة ثمانية عشر و نفذت في ثلثها و هو ستة، و في الزائد و هو ثلاثة احتاج الى إمضاء الابن و البنت، فان أمضى الابن دون البنت نفذت في اثنين و بطلت في واحد، و ان أمضت البنت نفذت في واحد و بطلت في اثنين.

مسألة ٢٨ ـ لو أوصى بعين معينة أو مقدار كلي من المال كمأة دينار يلاحظ في كونه بمقدار الثلث أو أقل أو أزيد بالنسبة إلى أمواله حين الفوت لا حين الوصية، فلو أوصى بعين كانت بمقدار نصف أمواله حين الوصية و صارت لجهة بمقدار الثلث مما ترك حين الوفاة نفذت في الكل، ولو انعكس نفذت في مقدار الثلث مما ترك ، و بطلت في الزائد و هذا مما لا إشكال فيه، و انما الاشكال فيما إذا أوصى بكسر مشاع كما إذا قال: «ثلث مالي لزيد بعد و فاتي» ثم تجدد له بعد الوصية أموال و أنه هل تشمل الوصية الزيادات المتجددة بعدها أم لا؟ سيما إذا لم تكن متوقعة الحصول، و الظاهر نظراً إلى شاهد الحال أن المراد بالمال هو الذي لو لم يوص بالثلث كان جميعه للورثة، و هو ما كان له عند الوفاة، نعم لو كانت قرينة تدل على أن مراده الأموال الموجودة حال الوصية اقتصر عليها.

مسألة ٢٩ ـ الاجازة من الوارث إمضاء و تنفيذ، فلا يكفي فيها مجرد الرضى و طيب النفس من دون قول أو فعل يدلان على الامضاء.

مسألة ٣٠ ـ لا تعتبر في الاجازة الفورية.

مسألة ٣١ ـ يحسب من التركة ما يملك بالموت كالدية، و كذا ما يملك بعد الموت إذا أوجد الميت سببه قبل موته مثل ما يقع في الشبكة التي نصبها الميت في زمان حياته، فيخرج منه دين الميت و وصاياه، نعم بعض صورها محل تأمل.

Problem # 26. If the Testator's heirs approve part of the excess, and not the whole of it, the Will shall be fulfilled up to the amount approved by the heirs.

Problem # 27. If some of the heirs approve the excess excluding the others, the Will shall be fulfilled out of the share of those who have approved and cancelled as regards the share of the others. If the Testator has a son and a daughter, and he makes a Will of half of his property in favour of Zayd, his Legacy shall be divided into eighteen shares, and his will be fulfilled up to one-third of his Legacy that is six shares. As regards the excess, that is three shares, it shall require the approval of the son and daughter. If the son approves it, but not the daughter, the excess shall be fulfilled up to two shares, and cancelled by one share. If the excess is approved by the daughter, it shall be enforced by one share, and cancelled by the two shares.

Problem # 28. If a person has made a will concerning a definite property or an indefinite amount of money out of the Legacy, as one hundred Dinars, it shall be judged whether it is up to one-third, or more or less than one third of the property as it was at the time of his death and not at the time of making the Will. So if he bequeaths a property up to half of his total property at the time of making the Will, but due to some reason it has reduced to one-third of the total property, it shall be enforced in full. If, however, the case is reverse, it shall be enforced up to one-third of the property left by him and shall be cancelled as regards the excess. This is where there is no problem in it. But the problem arises if he bequeaths a joint property, as when he says : " One-third of my property shall go to Zayd after my death," Then something is added to his property, then whether his Will shall apply to the addition in the property or not, particularly when it was not expected, then apparently consideration shall be made of the circumstances, that by property he meant what if he had not bequeathed the whole would have gone to the heirs, and that is the property he had at the time of his death.

Of course, if the context shows that by the property he meant the property as it existed at the time of making the Will, then it shall be confined to that only.

Problem # 29. A permission by the heir means approval and fulfilment. So mere consent and good will are not enough unless followed by words and deeds signifying sanction.

Problem # 30. It is not a condition for the permission to be given immediately.

Problem # 31. Whatever is owned by a person consequent to his death is included in his property as *Diyat*, or Blood-money; so also what he comes to own after his death if he had provided its cause before his death, as the game or prey that falls into the net spread by him during his lifetime.

So the debt of the deceased as well his Bequests shall be deducted from such property. Of course, some of its conditions require perusal.

Problem # 32. The legatee is entitled to specify his one-third share in some special property in the legacy, or to assign the task of specification of the property to the executor, so the specified property

مسألة ٣٢ ـ للموصي تعيين ثلثه في عين مخصوصة من التركة، و له تفويض التعيين إلى الوصي، فيتعين فيما عينه، و مع الاطلاق كما لو قال ثلث مالي لفلان يصير شريكاً مع الورثة بالاشاعة، فلابد و أن يكون الافراز و التعيين برضا الجميع كسائر الأموال المشتركة.

مسألة ٣٣ ـ انما يحسب الثلث بعد إخراج ما يخرج من الأصل كالدين والواجبات المالية، فان بقي بعد ذلك شيء يخرج ثلثه.

مسألة ٣٤ ـ لو أوصى بوصايا متعددة غير متضادة و كانت من نوع واحد فان كانت جيعاً واجبة مالية ينفذ الجميع من الأصل، و ان كانت واجبة بدنية أو كانت تبرعية تنفذ من الثلث، فان و فى بالجميع أو زادت عليه و أجاز الورثة تنفذ في الجميع، و ان لم يجيزوا فان لم يكن بين الوصايا ترتيب و تقديم و تأخير في الذكر بل كانت مجتمعة كما إذا قال: «اقضوا عشرين سنة واجباتي البدنية» أو «اقضوا عشرين سنة صلواتي و صيامي» أو قال: «أعطوا زيداً و عمراً و خالداً كلاً منهم مأة دينار» كانت بمنزلة وصية واحدة، فيوزع النقص على الجميع بالنسبة، فلو أوصى بمقدار من الصوم و مقدار من الصلاة و لم يف الثلث بهما و كانت أجرة الصلاة ضعف أجرة الصوم ينتقص من وصية الصلاة ضعف ما ينتقص من الصوم، كما اذا كانت التركة ثمانية عشر و أوصى بستة لاستئجار الصلاة و ثلا ثة لاستئجار الصوم و لم يجز الورثة بطلتا في الثلا ثة، و توزع النقص عليهما بالنسبة، فينتقص عن الصلاة إثنان فيصرف فيها أربعة، وعن الصوم واحد و يصرف فيه إثنان، و كذا الحال في التبرعية، و ان كانت بينها ترتيب و تقديم وتأخير في الذكر بأن كانت الثانية بعد تمامية الأولى و الثالثة بعد تمامية الثانية و هكذا و كان المجموع أزيد من الثلث و لم يجز الورثة يبدأ بالأول فالأول الى أن يكمل الثلث و لغت البقية.

مسألة ٣٥ ـ لو أوصى بوصايا مختلفة بالنوع كما إذا أوصى بأن يعطى مقدار معين خمساً و زكاة، و مقدار صوماً و صلاة، و مقدار لاطعام الفقراء فان أطلق و

shall be as specified by him. If, however, he leaves it unspecified, as when he says: "One-third of my property shall go to such person," he shall become a partner in the legacy jointly, and it shall be indispensable to divide and specify [the shares] with the consent of all the partners as is done in case of point properties.

Problem # 33. The One-Third is determined after the deduction of what is deducted from the original [legacy], as the debts and other financial obligations, so that if something is left after such deductions, the One-Third shall be deducted from the residue.

Problem # 34. If the deceased has made several wills that are not against one another but were of the same type, then if they all belong to financial obligations, they shall be adjusted from the original property. If, however, they belong to physical obligations or were of voluntary type, they shall be adjusted from the One-Third. If One-Third is sufficient to fulfil all such obligations, well and good. But if the obligations exceed the amount of One-Third, but the heirs give permission, they shall be fulfilled accordingly. In case the heirs do not give permission, then if there is no sequence as to the precedence or subsequence in mentioning them, but they have all been mentioned jointly, as when the deceased has said: "Discharge the dues of my physical obligations for twenty years," or "Discharge the dues of my prayers and fasts for twenty years," or "Pay Zayd, 'Umar and Khalid one hundred Dinārs each, "they shall be treated as single Wills, and so the deficit shall be deducted from each of them proportionately. If he has made a will for some of the fasts and some of the prayers, and the One-Third is sufficient for both, and the wages for the prayers are double of that of fasts, the deduction from the wages of prayer shall be doubt of the deduction from the wages of fasts, as when the property left by the deceased has eighteen shares , and the deceased has made a will for the payment of six shares for hiring someone for offering prayers and three shares for keeping fasts, then if the heirs do not give permission to meet the deficiency, both shall be deficient in the One-Third, and the deficiency shall fall on each of them proportionately, so that two shares shall be deducted from the wages for prayers and four shares shall be spent on it, while one share shall be deducted from the wages for fasts and two shares shall be spent on it. The same rule shall apply to the voluntary obligations. If there is a sequence as to precedence and subsequence in mentioning them, as when the second obligation is to be fulfilled after the entire fulfilment of the first, and the third after the entire fulfilment of the second, and so on, and the total obligation exceeds the amount of the One-Third, but the heirs do not give permission for meting the deficiency [from their share], start shall be made from fulfilling the first obligation till the whole One-Third is consumed, and the rest of the obligations shall be cancelled.

Problem # 35. If the deceased has made Wills of different types, as when he has made a will for the payment of a specific amount on Khums and Zakāt, another specific amount on fasts and prayers , and a specific amount on feeding the poor, then if he has made it in general terms, and has not mentioned as to the source from which they are to be defrayed, then their payment shall be started from that of the

لم يذكر المخرج يبدأ بالواجب المالي فيخرج من الأصل فان بقي شيء يعين ثلثه و يخرج منه البدني و التبرعي، فان وفى بهما أو لم يف و أجاز الورثة نفذت في كليهما، و ان لم يف و لم يجيزوا يقدم الواجب البدني و يرد النقص على التبرعي، و إن ذكر المخرج و أوصى بأن تخرج من الثلث تقدم الواجبات مالية كانت أو بدنية على التبرعي على الأقوى و أما الواجبات فلا يقدم بعضها على بعض، بل الظاهر أنه لو أوصى مرتباً يقدم المقدم فالمقدم إلى أن يفنى الثلث، فان بقي من الواجب المالي شيء يخرج من الأصل، و إن بقي من البدني يلغى، و إن لم يكن بينها ترتيب يوزع الثلث عليها و يتم الواجب المالي من الأصل دون البدني.

مسألة ٣٦ ـ لو أوصى بوصايا متضادة بأن كانت المتأخرة منافية للمتقدمة كما لو أوصى بعين شخصية لواحد ثم أوصى بها لآخر أو أوصى بثلثه لشخص ثم أوصى به لآخر كانت اللاحقة عدولاً عن السابقة فيعمل باللاحقة، ولو أوصى بعين شخصية لشخص ثم أوصى بنصفها مثلاً لشخص آخر فالظاهر كون الثانية عدولاً بالنسبة إلى النصف لا التمام فيبقى النصف الآخر للأول.

مسألة ٣٧ ـ متعلق الوصية إن كان كسراً مشاعاً من التركة كالثلث أو الربع ملكه الموصى له بالموت و القبول، و له من كل شيء ثلثه أو ربعه وشارك الورثة فيها من حين ما ملكه، هذا في الوصية التمليكية، و أما في العهدية كما إذا أوصى بصرف ثلثه أو ربع تركته في العبادات و الزيارات كان الموصى به فيها باقياً على حكم مال الميت، فهو يشارك الورثة حين ما ملكوا بالارث. فكان للميت من كل شيء ثلثه أو ربعه و الباقي للورثة، و هذه الشركة باقية ما لم يفرز الموصى به عن ما لهم و لم تقع القسمة بينهم و بين الموصى له، فلو حصل نماء متصل أو منفصل قبل القسمة كان بينهما، ولو تلف شيء من التركة كان منهما، و إن كان ما أوصى به مالاً معيناً يساوي الثلث أو دونه اختص بالموصى له، و لا اعتراض فيه للورثة، و لا حاجة الى إجازتهم، لكن انما يستقر ملكية الموصى له أو الميت في تمام الموصى به إذا كان يصل إلى الوارث ضعف ما أوصى به، فاذا

financial obligations, so that their payment shall be deducted from the original property/ Then if something is left, specification of the One-Third shall take place, and the physical and voluntary obligations shall be fulfilled. If the One-third suffices for fulfilment of both,[well and good]. If not, and the heirs give permission [for meeting the deficiency], both shall be fulfilled. If, however, it is not sufficient for the fulfilment of both and the heirs do not give permission [to meet the deficiency], the physical obligations shall be preferred and the deficiency shall fall on the voluntary obligations. If, however, he has mentioned the source, and has said in the Will that they are to be paid from the One-Third, according to the stronger opinion, the financial and physical obligations shall be preferred to the voluntary obligations.

As regards the obligations, they are not to be preferred to one another. Rather it is obvious that if he has observed some sequence, the previous ones shall be preferred to the later until it covers the whole One-Third. If there remains something out of the financial obligations, it shall be paid from the original property. If there remains something out of the physical obligations, it shall be cancelled. If there is no sequence between them, the One-Third shall be distributed among them, and the financial obligations shall be completed out of the original property, but not the physical ones.

Problem # 36. If the deceased has made some contradictory wills so that the subsequent ones are contradictory to the prior ones, as when he has bequeathed a specific property to one person and subsequently he has bequeathed to another, or when he has bequeathed One-Third of his property to one person and subsequently he has bequeathed it to another, the subsequent ones being contradictory to the prior ones, action shall be taken on the subsequent ones. If, however, he has bequeathed a specific property to one person and subsequently he bequeaths half of it to another, then apparently the subsequent one shall be contrary to the prior one to the extent of half but not entirely, so the remaining half shall still belong to the first.

Problem # 37. If the property concerned with the will is a joint fraction of the legacy as one-third, or one-fourth, the legatee shall become its owner on the death of the testator and the legatee's acceptance, and he shall be entitled to own one-third or one-fourth of every thing, and shall become a partner in it with the heirs [of the deceased] with effect from the time he comes to own it. This is the case in a Proprietary Will. As regards a Mandatory Will, as when the testator has made a will for spending one=third of one-fourth of his inheritance on prayers, and pilgrimages, the property relating to the will shall continue to be the property of the deceased, it shall be a part of the inheritance to be shared with the heirs from the time they come to own the inheritance, and so one-third or one-fourth of each property shall remain property of the deceased, and the rest shall belong to the heirs. This partnership shall remain intact until the property relating to the will is separated from what belongs to the heirs and until the division does not place between the heirs and property relating to the will. If some internal or external growth takes place in the property before the division, it shall be divided between both of them. Similarly, if some damage is done to the property [before the division takes place], it shall be borne by both. If the property relating to the will is a definite property equal to one-third or less, it

كان له مال عند الورثة بهذا المقدار استقرت ملكية تمام المال المعين، فللموصى له أو الوصي التصرف فيه أنحاء التصرفات، و إن كان ما عدا ما عيّن غائباً توقف ذلك على حصول مثليه بيد الورثة، نعم للموصى له أو الوصي التصرف في الثلث بمثل الانتقال إلى الغير، بل لهما المطالبة بتعيين الثلث حتى يتصرفا فيه كيف شاءا و إن لم يكن للورثة التصرف في الثلثين بوجه من الوجوه، ولو لم يحصل بيد الورثة شيء منه شاركوا الموصى له في المال المعين أثلاثاً: ثلث للموصى له و ثلثان للورثة.

مسألة ٣٨ ـ يجوز للموصي أن يعين شخصاً لتنجيز وصاياه و تنفيذها فيتعين، و يقال له: الموصى اليه و الوصي، و يشترط فيه البلوغ و العقل و الاسلام، فلا تصح وصاية الصغير ولا المجنون ولا الكافر عن المسلم و إن كان ذمياً قريباً، و هل يشترط فيه العدالة أم يكفي الوثاقة؟ لا يبعد الثاني و ان كان الأحوط الأول.

مسألة ٣٩ ـ انما لا تصح وصاية الصغير منفرداً، و أما منضماً إلى الكامل فلا بأس به، فيستقل الكامل بالتصرف الى زمان بلوغه، فاذا بلغ شاركه من حينه، و ليس له الاعتراض فيما أمضاه الكامل سابقاً إلا ما كان على خلاف ما أوصى به الميت، فيرده الى ما أوصى به، ولو مات الصغير أو بلغ فاسد العقل كان للكامل الانفراد بالوصاية.

مسألة ٤٠ ـ لو طرأ الجنون على الوصي بعد موت الموصي فهل تبطل الوصاية أم لا؟ لا يخلو الثاني من وجه و إن لم تنفذ تصرفاته، فلو أفاق جازت التصرفات، لكن الأحوط نصب الحاكم إياه، نعم لو كان جنونه بحيث لا يرجى زواله فالظاهر بطلانها.

مسألة ٤١ ـ الأحوط أن لا يردّ الابن وصية والده، و لا يجب على غيره قبول الوصاية، و له أن يردها مادام الموصي حياً بشرط أن يبلغه الرد و إن كان الأحوط الأولى أن لا يرد فيما إذا لم يتمكن الموصي من الايصاء إلى غيره، فلو

shall belong to the legatee and the heirs shall not be entitled to interfere in it, and there is no need for obtaining their permission. However, the ownership of the legatee or the deceased shall be established in the entire property relating to the will when the share of the heir[s] is double of what has been bequeathed by the testator. If there is property of such amount with the heirs, the ownership of the [of the legatee] in the entire specified property shall be established, and the legatee or executor shall be entitled to make changes of various kinds in it. If the property excluding what has been bequeathed is not there, the right to make changes in the property shall no take effect until double its amount does not come in possession of the heirs. Of course, the legatee or the executor shall be entitled to make changes in One-Third [of the property], as transferring it to some one else. Rather they shall be entitled to demand the determination of the One-Third [of the property] in order to enable them to make changes in it as they like, though the heirs shall not be entitled to make any kind of change in the remaining two-third. If they fail to obtain the property that is not there to be in the possession of the heirs, the legatee shall share the specified property, one–third of it going to the legatee and the remaining two-third to the heirs.

Problem # 38. A testator is entitled to appoint some one to implement the wills and enforcing them. Thus the appointment of person shall be valid, and he shall be called "*Mūṣā Ilay*" or "*Waṣī*". He must fulfil the conditions of adulthood, sanity and Islam, So a Muslim cannot appoint a minor, a lunatic or an infidel as his executor, even if he happens to be a closely related *Dhimmī*. Whether it is also a condition for him to be morally sound or mere trustworthiness is enough, the latter is not far from being acceptable, though the former shall be more cautious.

Problem # 39. It is not valid to appoint a minor alone [as an executor], but there is no objection in his appointment if it is appended to the appointment of an adult. So the adult person shall act independently until the other attains majority, so that the latter shall share the former with effect from his majority, but he shall not be entitled to have any objection on what has been done by the adult previously except on what has been contrary to the will of the deceased. So he shall make it to conform to the will of the deceased. In case the death of the minor or if he attains majority in a state of insanity, the adult person shall be entitled to act independently with regard to the will.

Problem # 40. If the executor becomes insane after the death of the testator, whether his appointment as executor shall be cancelled or not, the latter shall be case, even if the changes made by him [in the property of the testator] shall not be enforceable. If [subsequently] sanity is restored, he be allowed to make changes [in the testator's property], though it is more cautious to appoint a judge as well. Of course, if his insanity is of a nature in which there is no hope of restoration of sanity, then apparently [his appointment as an executor] shall be cancelled.

Problem # 41. It is more cautious for a son not to reject the will of his father, and no one else is bound to accept it. He is, however, allowed to reject it during the lifetime of his father, provided that his rejection has reached his knowledge, though it is more cautious for him not to reject it when it is not possible for the testator to appoint another as executor. If the rejection was made after the testator's death or during his lifetime but it has not reached his knowledge until his death, the will shall become

كان الرد بعد موت الموصي أو قبله و لكن لم يبلغه حتى مات كانت الوصاية لازمة على الوصي و ليس له الرد، بل لو لم يبلغه أنه قد أوصى إليه و جعله وصياً إلا بعد موت الموصي لزمته الوصاية و ليس له ردها.

مسألة ٤٢ ـ يجوز للموصي أن يجعل الوصاية لاثنين فما فوق، فان نص على الاستقلال و الانفراد لكل منهما أو كان لكلامه ظهور فيه ولو بقرينة حال أو مقال فيتبع، و إلا فليس لكل منهما الاستقلال بالتصرف لا في جميع ما أوصى به و لا في بعضه، وليس لهما أن يقسما الثلث و ينفرد كل منهما في نصفه، من غير فرق في ذلك بين أن يشترط عليهما الاجتماع أو يطلق، ولو تشاحا و لم يجتمعا أجبرهما الحاكم على الاجتماع، فان تعذر استبدل بهما، هذا إذا لم يكن التشاح لاختلاف اجتهاد هما و نظرهما، و إلا فألزمهما على نظر ثالث إذا كان في إنظارهما تعطيل العمل بالوصاية، فان امتنعا استبدل بهما، و إن امتنع أحدهما استبدل به.

مسألة ٤٣ ـ لو مات أحد الوصيين أو طرأ عليه الجنون أو غيره مما يوجب ارتفاع وصايته فالأحوط مع عدم استقلال كل منهما ضم الحاكم شخصاً إليه، بل اللزوم لا يخلو من قوة، ولو ماتا معاً احتاج إلى النصب من قبله، فهل اللازم نصب إثنين أو يجوز نصب واحد إذا كان كافياً؟ و جهان، أحوطهما الأول و أقواهما الثاني.

مسألة ٤٤ ـ يجوز أن يوصي إلى واحد في شيء و إلى آخر في غيره و لا يشارك أحدهما الآخر.

مسألة ٤٥ ـ لو قال: «أوصيت إلى زيد فان مات فالى عمرو» صح و يكون وصياً بعد موته، و كذا لو قال: «أوصيت إلى زيد فان كبر ابني أو تاب عن فسقه أو اشتغل بالعلم فهو وصيي» فانه يصح، و تنتهي وصاية زيد بحصول ما ذكر.

مسألة ٤٦ ـ لو ظهرت خيانة الوصي فعلى الحاكم عزله و نصب شخص آخر مكانه أو ضم أمين إليه حسب ما يراه من المصلحة، ولو ظهر منه العجز عن

binding on the executor, and he shall not be entitled to reject it any more. Rather it shall be binding even in case he has not been informed about his appointment as an executor except after the testator's death, and he shall not be entitled to reject it.

Problem # 42. A testator is allowed to appoint two or more persons as executors. If he has explicitly declared that each of them shall act independently or alone, or it is apparent from his statement, from the context, literally or circumstancially, action shall be taken accordingly; otherwise, none of them shall be entitled to act independently to make any change in the legacy partly or entirely. Both of the executors shall not be entitled to divide the One-third and act alone in respect of his own half, without there being any difference whether there is a condition of their acting jointly or it has been left unmentioned. If they have a conflict and fail to join each other, the judge shall compel them to join. If he is not able to do so, he may change them. This is the when the conflict id not due to their individual judgement or point of view; otherwise, he shall bind them to act upon the opinion of a mediator provided that their difference of opinion may be impeding the execution of the Will. If both of them refuse to accept it, the judge shall change both of them. If, however, one of them refuses to accept it, he shall change him.

Problem # 43. If either of the two executors dies or becomes insane, or suffers some other deficiency that causes the loss of his assignment as an executor, then, according to the more cautious opinion, if they are not required to act independently, the judge shall add another person for the purpose, rather its being binding is not without force. If both the executors die together, appointment [of other persons as executors] by the judge shall be necessary. Whether it is necessary to appoint two executors or the appointment of a single executor when sufficient shall be allowed, there are two alternatives, the more cautious being the former, while the stronger of the two being the latter.

Problem # 44. A testator may appoint one person for one purpose and another for another purpose, in a way that neither should join the other [in the execution of their respective assignments].

Problem # 45. If a person states [in his Will]: "I have appointed Zayd as executor [of my Will], and in the event of his death 'Amr," it shall be valid, and 'Amr shall act as executor after Zayd's death. Same shall be the case if he says: "I have appointed Zayd as the executor [of my Will], and if my son attains puberty or repents from moral depravity (*Fisq*) or indulges in studies, he shall act as the executor," it shall also be valid, and the appointment of Zayd as executor shall terminate with the materialisation of what has been mentioned.

Problem # 46. If it appears that the executor has turned treacherous, it shall be the duty of the judge to dismiss him and appoint another person in his place or add a trustee with him according to what he deems advisable. If it appears that the executor is unable to act independently, he shall add another person to assist him. If, however, he becomes unable to manage and act at all in a way that there is no

الاستقلال ضم اليه من يساعده، و أما إن عجز عن التدبير و العمل مطلقا بحيث لا يرجى زواله كالهرم الخرف فالظاهر إنعزاله، و على الحاكم نصب شخص آخر مكانه.

مسألة ٤٧ ـ لو لم ينجز الوصي ما أوصي اليه في حياته ليس له أن يجعل وصياً لتنجيزه بعد موته إلا إذا كان مأذوناً من الموصي في الايصاء.

مسألة ٤٨ ـ الوصي أمين، فلا يضمن ما كان في يده إلا مع التعدي أو التفريط ولو بمخالفة الوصية، فيضمن لو تلف.

مسألة ٤٩ ـ لو أوصى إليه بعمل خاص أو قدر مخصوص أو كيفية خاصة اقتصر عليه و لم يتجاوز إلى غيره، و أما لو أطلق بأن قال: «أنت وصيي» من دون ذكر المتعلق فالأقرب وقوعه لغواً إلا إذا كان هناك عرف خاص و تعارف يدل على المراد، فيتبع كما في عرف بعض الطوائف، حيث ان مرادهم بحسب الظاهر الولاية على أداء ما عليه من الديون، واستيفاء ما له على الناس، ورد الأمانات و البضائع إلى أهلها، و إخراج ثلثه وصرفه فيما ينفعه ولو بنظر الحاكم من استئجار العبادات و أداء الحقوق الواجبة والمظالم و نحوها، نعم في شموله بمجرده للقيمومة على الأطفال تأمل و إشكال، فالأحوط أن يكون تصديه لأمورهم باذن من الحاكم، و بالجملة المدار هو التعارف بحيث يكون قرينة على مراده، فيختلف باختلاف الأعصار و الأمصار.

مسألة ٥٠ ـ ليس للوصي أن يعزل نفسه بعد موت الموصي، و لا أن يفوض أمر الوصية إلى غيره، نعم له التوكيل في بعض الأمور المتعلقة بها مما لم يتعلق الغرض إلا بوقوعها من أي مباشر كان خصوصاً إذا كان مما لم يجر العادة على مباشرة أمثال هذا الوصي و لم يشترط عليه المباشرة.

مسألة ٥١ ـ لو نسي الوصي مصرف الوصية مطلقا فان تردد، بين أشخاص محصورين يقرع بينهم على الأقوى، أو جهات محصورة يقسط بينها، و تحتمل القرعة، و يحتمل التخيير في صرفه في أيّ الجهات شاء منها و لا يجوز صرفه في

hope of the removal of the inability as becoming senile due to old age, then apparently he shall be dismissed, and it shall be up to the judge to appoint another person in his place.

Problem # 47. If an executor fails to execute his assignment during his lifetime, he shall not be entitled to appoint another person to execute it after his death, except when he was granted permission by the testator for appointing an executor.

Problem # 48. An executor is a trustee. So he is not liable for what is in his possession, except in case of an omission or commission even if it was in the form of violation of the Will, in which case he shall be held liable if [the property in his possession] is destroyed.

Problem # 49. If a testator has assigned to the executor a particular task, a special amount or a definite manner, he shall have to confine himself to it, and should not overstep it. If , however, the testator has left it unmentioned, so that he has said : " You are my executor," without mentioning the assignment, then, according to the opinion closer to the traditional authority, it shall be a Will executed invalidly, except when there exists some purpose according to the prevalent custom and tradition, and so action shall be taken according to the custom prevalent in some communities, so that its purpose is meant apparently to act as an agent for the payment of the testator's debts, or fulfilment of his obligations towards the people, returning the things placed in his trusts or goods to their owners, deducting his share of One-third [from his property] and spending it on what is beneficial for him even if in the opinion of the judge as hiring someone for the performance of worship, or discharging the due rights, *Maẓālim*, or the like. Of course, there is hesitation and difficulty in inclusion solely of the guardianship of children in it.

Problem # 50. An executor is not entitled to dismiss himself after the testator's death, or entrust the duty assigned by the Will to another.

Of course, he is entitled to entrust some of the tasks to an agent in which the purpose is performance no matter who performs them, particularly in case where according to the prevalent custom their performance is not required personally by such persons as the executor, and it is not a condition for him to perform them personally.

Problem # 51. If the testator has totally forgotten to mention the purpose on which his legacy is to he spent, then if the ambiguity lies among a limited number of persons, then, according to the stronger opinion, the matter shall be decided by casting lots, or if it lies among some limited purposes, it shall be divided among them, though there is likelihood of casting lots.

There is also likelihood of selection in spending on whatever purposes he likes, though, according to the opinion closer to the traditional authority, it is not allowed to be spent on general

مطلق الخيرات على الأقرب، و إن تردد بين أشخاص أو جهات غير محصورة يجوز صرفه في الخيرات المطلقة في الأول، و الأولى عدم الخروج عن طرف الشبهة، وجهة من الجهات في الثاني بشرط عدم الخروج عن أطراف الشبهة.

مسألة ٥٢ ـ لو أوصى الميت وصية عهدية و لم يعين وصياً أو بطل وصاية من عيّنه بموت أو جنون أو غير ذلك تولى الحاكم أمرها أو عيّن من يتولاه، ولو لم يكن الحاكم و لا منصوب به تولاه من المؤمنين من يوثق به.

مسألة ٥٣ ـ يجوز للموصي أن يجعل ناظراً على الوصي، و وظيفته تابعة لجعله، فتارة من جهة الاستيثاق على وقوع ما أوصى به يجعل الناظر رقيباً على الوصي بأن يكون أعماله باطلاعه حتى أنه لو رأى منه خلاف ما قرره الموصي لاعترض عليه، و أخرى من جهة عدم الاطمئنان بأنظار الوصي و الاطمئنان بأنظار الناظر يجعل على الوصي أن يكون أعماله على طبق نظره، و لا يعمل إلا مارآه صلاحاً، فالوصي و ان كان ولياً مستقلاً في التصرف لكنه غير مستقل في الرأي و النظر، فلا يمضى من أعماله إلا ما وافق نظر الناظر، فلو استبد الوصي بالعمل على نظره من دون مراجعة الناظر و اطلاعه و كان عمله على طبق ما قرره الموصي فالظاهر صحته و نفوذه على الأول بخلافه على الثاني، و لعل الغالب المتعارف في جعل الناظر في الوصايا هو النحو الأول .

مسألة ٥٤ ـ يجوز للأب مع عدم الجد و للجد للأب مع فقد الأب جعل القيم على الصغار ومعه لا ولاية للحاكم، و ليس لغيرهما أن ينصب القيم عليهم حتى الأم.

مسألة ٥٥ ـ يشترط في القيم على الاطفال ما اشترط في الوصي على المال، و الأحوط اعتبار العدالة، و إن كان الاكتفاء بالأمانة و وجود المصلحة ليس ببعيد.

مسألة ٥٦ ـ لو عين الموصي على القيم تولي جهة خاصة و تصرفاً مخصوصاً اقتصر عليه، و يكون أمر غيره بيد الحاكم أو المنصوب من قبله، فلو جعله قيماً في

charitable purposes.

If the ambiguity lies between indefinite persons or purposes, it is allowed to be spent on general charitable purposes in the former case. It is better that it should not be beyond various types of suspicion and any of the purposes in the latter case, on the condition that it should not be beyond the various types of suspicion.

Problem # 52. If a testator has made a Mandatory Will, but has not specified any executor, or the appointment has been cancelled due to the executor's death, insanity or the like, the judge shall act as the guardian or shall appoint someone to act as guardian. If there is neither a judge nor one appointed by the testator, the believers shall appoint some one to act as the guardian.

Problem # 53. A testator is allowed to appoint a supervisor over the executor, and his duty shall be in accordance with the agreement. Sometimes he is appointed for the purpose of assurance of the performance of what has been assigned by testator, the testator appoints the supervisor as a caretaker on the executor, so that all the actions of the executor may be in the knowledge of the supervisor in order that he may raise objection whenever he finds some violation of what had been assigned by the testator. Sometimes he is appointed due to the lack of satisfaction with the views of the executor and satisfaction with the views of the supervisor declaring that the executor's action must be in accordance with the supervisor's views, and he should not act except what the supervisor considers advisable. [In such case,] the executor, although a guardian, is independent in his actions, but he is not independent in his views and opinions, so that his actions are not approved except those that are in conformity with the supervisor's views. If the executor acts arbitrarily according to his own view without referring to the supervisor and without his knowledge, but his action was according to what had been assigned by the testator, then apparently it shall be valid and enforceable according to the first manner, but otherwise in case of the latter. Probably it has been the first manner in most of the cases of appointment of a supervisor in the execution of Wills.

Problem # 54. A father in the absence of a grandfather and a paternal grandfather in the absence of a father are allowed to appoint an Administrator (*Qayyim*) over minors, and in their presence the judge has no right of guardianship [over the minors]. No person other than the two,[namely, the father and the paternal grandfather], is entitled to appoint an Administrator over the minors including even the mother.

Problem # 55. The same conditions are required in an Administrator over the minors as required in case of an executor appointed over a property. According to the more cautious opinion, moral soundness is also a condition for him, although honesty (*Amānat*) and observation of [the minors'] interest are not far from being sufficient.

Problem # 56. If a testator appoints an Administrator for a special purpose or make a particular change, he shall confine himself to it, while other matters are in the charge of the judge or one appointed by him. So if a testator has appointed an Administrator, for example, for the protection of his property and what is concerned with spending it, he shall have no authority over his property as regards its sale, lease or the like, or giving the minors on hire or the like, or the payment and settlement of his debts, even if his appointment has been made in general terms, as, for example. saying :"Such person

حفظ ما له و ما يتعلق بانفاقه مثلاً ليس له الولاية على أمواله بالبيع و الاجارة و نحوهما و على نفسه بالاجارة و نحوها و على ديونه بالوفاء و الاستيفاء، ولو أطلق و قال: «فلان قيم على أولادي» مثلاً كان ولياً على جميع ما يتعلق بهم مما كان للموصي الولاية عليه، فله الانفاق عليهم بالمعروف و الانفاق على من عليهم نفقته، و حفظ أموالهم و استنماؤها واستيفاء ديونهم، و إيفاء ما عليهم، كأرش ما أتلفوا من أموال الناس، و كذا إخراج الحقوق المتعلقة بأموالهم كالخمس و غير ذلك، و في ولايته على تزويجهم كلام يأتي في محله إنشاء الله تعالى.

مسألة ٥٧ ـ يجوز جعل الولاية على الأطفال لاثنين فما زاد بالاستقلال و الاشتراك و جعل الناظر على الوصي كالوصية بالمال.

مسألة ٥٨ ـ ينفق الوصي على الصبي من غير إسراف و لا تقتير، فيطعمه و يلبسه عادة أمثاله و نظرائه، فان أسرف ضمن الزيادة، ولو بلغ فأنكر أصل الانفاق أو ادعى عليه الاسراف فالقول قول الوصي بيمينه، و كذا لو ادعى عليه أنه باع ماله من غير حاجة و لا غبطة، نعم لو اختلفا في دفع المال إليه بعد البلوغ فادعاه الوصي و أنكره الصبي قدم قول الصبي و البينة على الوصي.

مسألة ٥٩ ـ يجوز للقيم الذي يتولى أمور اليتيم أن يأخذ من ماله أجرة مثل عمله سواء كان غنياً أو فقيراً، و إن كان الأحوط الأولى للأول التجنب، و أما الوصي على الأموال فان عين الموصي مقدار المال الموصى به و طبقه على مصرفه المعين بحيث لم يبق شيئاً لأجرة الوصي و استلزم أخذها إما الزيادة على المال الموصى به أو النقصان في مقدار المصرف لم يجز له أن يأخذ الأجرة لنفسه، و إن عين المال و المصرف على نحو قابل للزيادة و النقصان كان حاله حال متولي الوقف في أنه لو لم يعين له جعلاً معيناً جاز له أن يأخذ أجرة مثل عمله، كما إذا أوصى بأن يصرف ثلثه أو مقداراً معيناً من المال في بناء القناطر و تسوية المعابر و تعمير المساجد.

مسألة ٦٠ ـ الوصية جائزة من طرف الموصي، فله أن يرجع عنها ما دام فيه

is an Administrator over my children," he shall have authority over all those things over which the testator has authority, so that he shall have the authority to spend on them in the usual manner and maintain those whom he is liable to maintain, protection of their property and its produce, settlement of their debts, payment of their dues, as compensation for the damage done by them to the property of other people, and , likewise, appropriation of the obligations due from their property, as Khums, etc. As regards his authority over marrying or giving them in marriage, there is controversy on it, and, God Willing, it shall be mentioned in its proper place.

Problem # 57. It is allowed to give the guardianship of [minor] children to two or more persons to act independently or jointly, and appoint a supervisor over an executor as in case of a Proprietary Will.

Problem # 58. An executor shall spend on a [minor] child without extravagance or niggardliness. So he shall provide him with food and clothing as is usual with others like him. If he indulges in extravagance, he shall be held responsible for it. If the child after attaining puberty denies that anything has been spent on him at all or claims that the executor has spent extravagantly on him, the executor's word shall be entertained followed by his oath. The same shall be the rule if the [minor] child claims that the executor has sold his property unnecessarily without observing his interest. Of course, if they differ on the delivery of the property to the child after his attaining to puberty, where the executor claims to have delivered the property to the child while the child denies it, the child's word shall be preferred and the executor shall be required to produce evidence [in favour of his claim].

Problem # 59. An administrator appointed to look after the affairs of an orphan [child] shall be allowed to get out of the property the proper wages for his service, regardless whether he is rich or poor, although it is more cautious for him to abstain from it in case of being rich. If, however, a person has been appointed an executor over a property and the testator has specified the amount of the legacy and has also prescribed a definite amount to be spent in a way that there remains nothing for the executor's wages, and its deduction would cause an increase in the amount of legacy or deficiency in the amount required to be spent, the executor shall not be allowed to get his wages.

If, however, he has specified the property and expenditure in a way that it may be increased or decreased, the executor's position shall be similar to that of a trustee of an endowment who is allowed to get the proper wages for his work if no remuneration has been prescribed for him, as when a person makes a will for spending his One-third or a specific amount of the property on the construction of bridges, levelling roads or building mosques.

Problem # 60. Making a will by a testator is a lawful act. So it is lawful for him to revoke it as long there is soul in his body, [as long as he is alive], change it altogether, or some of its contents, manners and its adjuncts. He is authorized to change the legacy entirely or partly, or change the executor or the legatee

الروح و تبديلها من أصلها أو من بعض جهاتها وكيفياتها و متعلقاتها، فله تبديل الموصى به كلاً أو بعضاً و تغيير الوصي و الموصى له و غير ذلك، و لو رجع عن بعض الجهات يبقى غيرها بحاله، فلو أوصى بصرف ثلثه في مصارف مخصوصة و جعل الوصاية لزيد ثم بعد ذلك عدل عن وصاية زيد و جعلها لعمرو يبقى أصل الوصية بحاله، و كذلك إذا أوصى بصرف ثلثه في مصارف معينة على يد زيد ثم بعد ذلك عدل عن تلك المصارف الى أخرى تبقى الوصاية على يد زيد بحالها و هكذا، و كما له الرجوع في الوصية المتعلقة بالمال كذلك له الرجوع في الوصية بالولاية على الأطفال.

مسألة ٦١ - يتحقق الرجوع عن الوصية بالقول، و هو كل لفظ دال عليه عرفاً بأيّ لغة كان، نحو رجعت عن وصيّتي أو أبطلتها أو عدلت عنها أو نقضتها و نحوها، و بالفعل، و هو إما باعدام موضوعها كاتلاف الموصى به، و كذا نقله إلى الغير بعقد لازم كالبيع أو جائز كالهبة مع القبض، و إما بما يعد عند العرف رجوعاً و إن بقي الموصى به بحاله و في ملكه، كما إذا و كل شخصاً على بيعه.

مسألة ٦٢ - الوصية بعد ما وقعت تبقى على حالها و يعمل بها لو لم يرجع الموصي و إن طالت المدة، ولو شك في الرجوع ولو للشك في كون لفظ أو فعل رجوعاً يحكم ببقائها و عدم الرجوع، هذا إذا كانت الوصية مطلقة بأن كان مقصود الموصي وقوع مضمون الوصية و العمل بها بعد موته في أيّ زمان قضى الله عليه، و أما لو كانت مقيدة بموته في سفر كذا أو عن مرض كذا و لم يتفق موته في ذلك السفر أو عن ذلك المرض بطلت تلك الوصية، ولو أوصى في جناح سفر أو في حال مرض و نحوهما و قامت قرائن حالية أو مقالية على عدم الاطلاق و أن نظره مقصور على موته في هذه الأحوال لا يجوز العمل بها، و إلا فالأقرب الأخذ بها والعمل عليها ولو مع طول المدة إلا إذا نسخها، سيما إذا ظهر من حاله أن عدم الايصاء الجديد لأجل الاعتماد على الوصية السابقة كما إذا شوهد منه المحافظة على ورقة الوصية مثلاً.

or the like.

If he revokes some parts of it, the other parts shall remain intact. So if he makes a will for spending his One-third on specific purposes, and appoints Zayd as the executor, and subsequently revokes his will relating to the appointment of Zayd as the executor and assigns it to 'Amr, [the other parts of] the Will shall remain intact.

Likewise, if he makes a will for spending his One-third on specific purposes through Zayd, and then revokes those purposes replacing them by other purposes, [the part of] the will relating to spending through Zayd shall remain intact, and so on.

As a man is entitled to revoke his will relating to a property, so is he entitled to revoke his Will concerning the guardianship of [his minor] children.

Problem # 61. A revocation of Will takes place by words, which means any words carrying the sense of revocation according to the usual custom in any language what so ever, as by saying :"I have withdrawn my Will," or "I have cancelled it," or "I have turned away from it," or "I have broken it,' or the like.

It may take place by deed, and that is by nullifying the subject of the Will as by destroying it, or similarly by transferring it to another person through a binding contract as sale or through a lawful contract as a gift (*Hibah*) followed by delivery [and possession], or what is considered a withdrawal in the usual custom, even if the subject of the Will remains intact and in his own possession, as when a person appoints another as his agent in its sale.

Problem # 62. A will once made remains intact, and action is taken on it if not withdrawn by the testator, even after the passage of a long period of time. In case there is a doubt about withdrawal, or there is doubt about the word or deed of withdrawal, judgement shall be made in favour of its being intact and absence of withdrawal.This is the case when the Will is absolute with the intention of the testator to make the subject of the Will and action on it to be effective after his death whenever it may take place.If, however, it is contingent to his death in a specific journey or a specific sickness, but his death does not take place during that journey or that sickness, the Will shall be cancelled.

If he has made a Will during a journey or sickness or the like, and the circumstantial or verbal indications signify its not being absolute and that his intention was confined to his death in such circumstances, action on it shall not be lawful; otherwise, according to the opinion closer to the traditional authority it shall be entertained and action shall be taken on it even despite passage of a long time, except when he has revoked it, particularly when it appears from the circumstances that the absence of making a fresh Will had been due to his satisfaction with his previous Will, as when it is

مسألة ٦٣ ـ لا تثبت الوصية بالولاية سواء كانت على المال أو على الأطفال إلا بشهادة عدلين من الرجال، و لا تقبل فيها شهادة النساء لا منفردات و لا منضمات بالرجال، و أما الوصية بالمال فهي كسائر الدعاوي المالية تثبت بشهادة رجلين عدلين و شاهد و يمين و شهادة رجل عدل و امرأتين عادلتين، و تمتاز من بين الدعاوي المالية بأمرين أحدهما۔ أنها تثبت بشهادة النساء منفردات و إن لم تكمل أربع و لم تنضم اليمين، فتثبت ربعها بواحدة عادلة، و نصفها باثنتين، و ثلاثة أرباعها بثلاث، و تمامها بأربع، ثانيهما۔ أنها تثبت بشهادة رجلين ذميين عدلين في دينهما عند الضرورة و عدم عدول المسلمين، و لا تقبل شهادة غير أهل الذمة من الكفار.

مسألة ٦٤ ـ لو كانت الورثة كباراً و أقروا كلهم بالوصية بالثلث و مادونه لوارث أو أجنبي أو بأن يصرف في مصرف تثبت في تمام الموصى به، و يلزمون بالعمل بها أخذاً باقرارهم، و لا يحتاج إلى بيّنة، و إن أقرّبها بعضهم دون بعض فان كان المقر إثنين عدلين تثبت أيضاً في التمام، لكونه إقراراً بالنسبة إلى المقر و شهادة بالنسبة إلى غيره، فلا يحتاج إلى بيّنة أخرى و إلا تثبت بالنسبة إلى حصة المقر، و يحتاج إلى البينة في الباقين، نعم لو كان المقر عدلاً واحداً و كانت الوصية بالمال لشخص أو أشخاص كفى ضم يمين المقر له باقرار المقر في ثبوت التمام، بل لو كان امرأة واحدة عادلة تثبت في ربع حصة الباقين على حذو ما تقدم في المسألة السابقة، و بالجملة المقر من الورثة شاهد بالنسبة إلى حصص الباقين كالأجنبي، فيثبت به ما يثبت به.

مسألة ٦٥ ـ لو أقر الوارث بأصل الوصية كان كالأجنبي، فليس له إنكار وصاية من يدعيها، و لا يسمع منه كغيره، نعم لو كانت الوصية متعلقة بالقصّر أو العناوين العامة كالفقراء أو وجوه القرب كالمساجد و المشاهد أو الميت نفسه كاستئجار العبادات و الزيارات له و نحو ذلك كان لكل من يعلم كذب مدعي الوصاية خصوصاً إذا رأى منه الخيانة الانكار عليه و الترافع معه عند الحاكم من

supported, for example, by the preservation of the deed of the Will.

Problem # 63. A Will for guardianship is not established except by the testimony of two just two male witnesses, regardless whether it concerns the guardianship over a property or minor children, and no testimony of women is accepted in it whether alone or jointly with men. However, a Proprietary Will, like all other proprietary claims, is established by the testimony of two just men, or a witness followed by his oath, and the testimony of a just male witness and two just women.

It is distinguished from the proprietary claims in two ways. Firstly, it is established by the testimony of individual women, even if they are not four in number and it is not followed by oath. So its one-fourth is established by the testimony of one just woman, half of it by the testimony of two [just] women, three-fourth of it by the testimony of three [just] women, and entirely by the testimony of four [just] women. Secondly, it is established by the testimony of two *Dhimmīs* who are morally sound in their faith in case of emergency, and the non-just Muslims, but the testimony of the infidels other than the *Dhimmīs* is not acceptable.

Problem # 64. If the heirs are adults, and all of them acknowledge the Will concerning One-third or less in favour of an heir or a stranger, or that it may be spent on a specific expenditure, it shall be established concerning the entire legacy, and they shall be bound to act upon it on the basis of their own acknowledgement, and there is no need of adducing evidence.

If, however, some of them acknowledge to the exclusion of others, then if those acknowledging are two just persons, it shall be established even concerning all of them, being an acknowledgement in respect of the acknowledging person and a testimony in relation to the others, and so there is no need of adducing other evidence; otherwise, it shall be effective in respect of the share of the acknowledging person, and it shall require adducing evidence in respect of others.

Of course, if the acknowledging person is a single just person the Proprietary Will is made in favour of one or more persons, it shall be sufficient to add the oath of the acknowledging person in order to establish acknowledgement in respect of the entire legacy. Rather, if there is a single just woman, it shall be established in respect of one-fourth of the rest in the manner explained in the preceding Problem. In short, an acknowledging person from among the heirs is a witness in respect of the shares of the rest like a stranger, and so it establishes what it establishes.

Problem # 65. If an heir acknowledges the Will itself, he shall be like a stranger. So he shall not be allowed to deny any person who claims to be an executor, and his denial shall not be entertained like those of others. Of course, if the Will concerns the legally minor persons or public institutions as the poor or means of attaining closeness [to Allāh] as the mosques, shrines or the deceased himself, as

باب الحسبة، لكن الوارث و الأجنبي في ذلك سيّان إلا فيما تعلقت بأمور الميت، فانه لا يبعد أولوية الوارث من غيره، و اختصاص حق الدعوى به مقدماً على غيره.

مسألة ٦٦ - قد مرّ في كتاب الحجر أن الوصية نافذة في الثلث، و في الزائد يتوقف على إمضاء الوارث، و المنجزات نافذة في الأصل حتى من المريض في مرض موته، و حتى المجانية و المحاباتية على الأقوى.

مسألة ٦٧ - لو جمع في مرض الموت بين عطية منجزة و معلقة على الموت فان و في الثلث بهما لا إشكال في نفوذهما في تمام ما تعلقتا به، و إن لم يف بهما يبدأ بالمنجزة، فتخرج من الأصل، و تخرج المعلقة من ثلث ما بقي مع عدم إذن الورثة.

hiring for the performance of worships or pilgrimages on his behalf, or the like, every person who knows about the falsehood of the person claiming to be appointed an executor [by the deceased] shall duty-bound to deny his claim and refer the matter to the judge as a non-litigous case, particularly when he observes treachery by him . However, an heir and a stranger are equal in such case, except what concerns the matters relating to the deceased, in which case it is not far from being likely that the heir enjoys preference over others, and he has an exclusive right to claim over and above others.

Problem # 66. It has already been mentioned under the Section on Interdiction (*Ḥajr*) that a Will is enforceable to the extent of One-third [of the deceased's property], and as regards the case when it exceeds the amount of One-third, it depends on the endorsement by the heirs, and that the accomplished or completed gifts (*Munajjazāt*) shall be deducted from the original property [of the deceased], even from a sick person in case of his death during sickness, and, according to the stronger opinion, even *Majjāniyyah* [i.e., things presented gratis, and not as a remuneration for any service] and *Maḥabātiyyah* [i.e. things presented out of good will or courtesy] are paid out of the original property.

Problem # 67. If during the sickness of death the already accomplished gifts and those contingent on the death lie together, then in case One-third is sufficient to meet both of them, there shall be no objection in fulfilling them in all cases that relate to it. If, however, it is not sufficient to meet both, payment shall be started from the already accomplished gifts. So its amount shall be deducted out of the original property, while the contingent ones shall be deducted out of one-third of the remainder, in case the heirs do not agree with its payment [out of the original property].

كتاب الايمان والنذور

القول في اليمين

و يطلق عليها الحلف والقسم، وهي ثلا ثة أقسام:

الأول ـ ما يقع تأكيداً و تحقيقاً للاخبار بوقوع شيء ماضياً أو حالاً أو استقبالاً.

الثاني ـ يمين المناشدة، و هي ما يقرن به الطلب و السؤال يقصد بها حث المسؤول على إنجاح المقصود كقول السائل «أسألك بالله أن تفعل كذا».

الثالث ـ يمين العقد وهي ما يقع تأكيداً و تحقيقاً لما بنى عليه و التزم به من إيقاع أمر أو تركه في الآتي، كقوله والله لأصومن أو لأتركن شرب الدخان مثلاً لا إشكال في أنه لا ينعقد القسم الأول، و لا يترتب عليه شيء سوى الاثم فيما كان كاذباً في إخباره عن عمد، و كذا لا ينعقد القسم الثاني، و لا يترتب عليه شيء من إثم أو كفارة لا على الحالف في إحلافه، و لا على المحلوف عليه في حنثه و عدم إنجاح مسؤوله، و أما القسم الثالث فهو الذي ينعقد عند اجتماع الشرائط الآتية، و يجب برّه و الوفاء به، و يحرم حنثه، و يترتب على حنثه الكفارة.

مسألة ١ ـ لا تنعقد اليمين إلا باللفظ أو ما يقوم مقامه كاشارة الأخرس، و لا تنعقد بالكتابة على الأقوى، و الظاهر أنه لا يعتبر فيها العربية خصوصاً في

SECTION THIRTY-ONE

OATHS (*AIMĀN*) & VOWS (*NUDHŪR*)

Chapter One - Oath (*Yamīn*)

A *Yamīn* is also called *Ḥilf* and *Qasam*. It is of three kinds, [as follows].

First : A Vow that takes place for emphasizing or confirming the information about the happening of something whether in the past, present or future.

Second : An earnest appeal or request (*Munāshadah*). It is accompanied by a demand or request intending thereby to persuade the addressee to accede to the demand or request, as when the person demanding or requesting says: "I request you, by God, to do such and such".

Third : An Oath of an Agreement (*Yamīn al 'Aqd*). It is what takes place in order to emphasize or confirm the intention or purpose of performance or forbearance of an act in future, when, for example, a person says: "By God, I will keep fast," or "By God, I will give up smoking."

There is no hesitation in saying that the first kind is not effective, and it does not entail any thing except a sin due to his deliberate falsehood in giving information.

Likewise, the second kind of vow is also not constituted, as it does not entail any sin or expiation on the part of the person swearing for taking an oath, nor on the part of the addressee for breaking it or non-performance of the demand or request.

As regards the third kind, however, it becomes effective provided that the following conditions are fulfilled, its compliance becomes obligatory, failure to fulfil it is unlawful, and it entails the liability of expiation.

Problem # 1. An oath does not take effect except by expressing it in words or what is used in its place as signs made by a dumb person, but, according to the stronger opinion, it does not take effect by writing.

Apparently there is no condition of employing particularly Arabic language in what concerns it.

متعلقاتها.

مسألة ٢ - لا تنعقد اليمين إلا إذا كان المقسم به هو الله جل شأنه إما بذكر اسمه العلمي المختص به كلفظ الجلالة، و يلحق به ما لا يطلق على غيره كالرحمان، أو بذكر الأوصاف و الأفعال المختصة به التي لا يشاركه فيها غيره كقوله: و مقلب القلوب و الأبصار، و الذي نفسي بيده، و الذي فلق الحبة و برأ النسمة و أشباه ذلك، أو بذكر الأوصاف و الأفعال المشتركة التي تطلق عليه تعالى و على غيره لكن الغالب إطلاقها عليه بحيث ينصرف عند الاطلاق إليه تعالى كالربّ و الخالق و البارىء و الرازق و الرحيم، و لا تنعقد بما لا ينصرف إليه كالموجود و الحيّ والسميع و البصير و القادر و إن نوى بها الحلف بذاته المقدسة على إشكال، فلا يترك الاحتياط.

مسألة ٣ - المعتبر في انعقاد اليمين أن يكون الحلف بالله تعالى لا بغيره فكل ما صدق عرفاً انّه حلف به تعالى انعقدت اليمين به، و الظاهر صدق ذلك بأن يقول: «و حق الله» و «بجلال الله» و «بعظمة الله» و «بكبرياء الله» و «لعمر الله» و في انعقادها بقوله: «بقدرة الله» و «بعلم الله» تأمل و إن لا يخلو من قرب.

مسألة ٤ - لا يعتبر في انعقادها أن يكون إنشاء القسم بحروفه بأن يقول: والله أو بالله أو تالله لأفعلنّ كذا، بل لو أنشأه بصيغتي القسم و الحلف كقوله: أقسمت بالله أو حلفت بالله انعقدت أيضاً، نعم لا يكفي لفظا أقسمت و حلفت بدون لفظ الجلالة أو ما هو بمنزلته.

مسألة ٥ - لا تنعقد اليمين بالحلف بالنبي صلى الله عليه و آله و الأئمة عليهم السلام و سائر النفوس المقدسة المعظمة، و لا بالقرآن الكريم و لا بالكعبة المشرفة و سائر الأمكنة المحترمة.

مسألة ٦ - لا تنعقد اليمين بالطلاق و نحوه بأن يقول: زوجتي طالق إن فعلت كذا أو إن لم أفعل، فلا يؤثر مثل هذه اليمين لا في حصول الطلاق و نحوه بالحنث و لا في ترتب إثم أو كفارة عليه، و كذا اليمين بالبراءة من الله تعالى أو من

Problem # 2. An oath does not take effect except by taking it upon Allāh whose Glory is dignified, either by using the particular proper names as the word Glorious, and to this added what is not used with others as Compassionate (*Raḥmān*), or the particular Attributes and Deeds that are not shared by others, as saying: "One who turns around the hearts and eyes, One in whose Hands rests my Soul, One who splits the grain and One who created the Soul (*Nasamah*)," or the like, or by using common Attributes or Deeds that are used with God, the Exalted as well as others than Him, but generally they are reserved for Him where the context shows that it is used exclusively for Him as "The Sustainer, The Creator, The Initiator, The Maintainer and The Beneficent," (*al-Rabb, al-Khāliq, al-Bārī'* and al-*Raḥīm)*.

An oath, however, does not take effect by using words that do not particularly signify Him, as "The Existent, The Living, The Listener, The Seer, and The Powerful," (*al-Mowjūd, al-Ḥayy, al-Samī', al-Baṣīr* and *al-Qādir*," even if the intention is to swear by Allah, the Holiness, although there is some hesitation in accepting this rule, and so caution must not be given up.

Problem # 3. It is a condition for an oath being effective that it must be upon Allāh, the Exalted, and upon no one else. So an oath takes effect by whatever it is confirmed by the usual custom that the swearing has been done upon Allāh. Apparently it shall apply to swearing upon Allāh if one says: "Upon the Truth of Allāh, By the Glory of Allāh, By the Majesty of Allāh, and By the Age of Allāh," "*Va Ḥaqqi Allāh,Bi Jalāli Allāh, Bi 'Aẓamati Allāh, Bi Kibriyā'i Allāh*, and *Bi 'Umri Allāh*". There is, however, hesitation in its taking effect if one says : "By the Power of Allāh, or By the Knowledge of Allāh," (*Bi Qudrati Allāh, Bi 'Ilmi Allāh)*, although it is not free from being close [to validity].

Problem # 4. It is not a condition the effectiveness of an oath that must be made by using particular prepositions, as: "*Vallāh, Billāh*,or *Tallāh*, I will do so and so." Rather it shall take effect even if various forms of the two words: *Qasam* or *Ḥilf* are used, as when one says: "*Aqasamtu bi Allāh,*" or "*Ḥalaftu biAllāh*" (I swear upon Allāh). It is not sufficient, however, to say: "*Aqsamtu*" or "*Ḥalaftu,*" without using the word : "*Bi Allāh*" (By God), or of the same content.

Problem # 5. An oath does not take effect if taken upon the Prophet (PBUH), Imāms (A.S.) or other holy persons, nor upon the Qur'ān, holy Ka'bah and other holy places.

Problem # 6. An oath for a divorce or the like is not effective, as when a person says: "My wife shall be divorced if I do or do not do so and so." Such oaths are neither effective in effecting a divorce or the like by means of its breach nor in entailing the commission of a sin or a liability of expiation.

Same shall be the case if an oath is taken upon disavowing Allāh, the Exalted, His Prophet (PBUH), his faith, or Imāms (A.S.) as, for example, when one says: "I shall disavow Allāh or the Faith of

رسوله(ص) أو من دينه أو من الأئمة عليهم السلام بأن يقول مثلاً: برأت من الله أو من دين الاسلام ان فعلت كذا أو لم أفعل كذا، فلا يؤثر في ترتب الاثم أو الكفارة على حنثه، نعم هذا الحلف بنفسه حرام، و يأثم حالفه من غير فرق بين الصدق و الكذب و الحنث و عدمه، بل الأحوط تكفير الحالف باطعام عشرة مساكين لكل مسكين مدّ، و يستغفر الله تعالى شأنه، و كذا لا تنعقد بأن يقول ان لم أفعل كذا فأنا يهودي أو نصراني مثلاً.

مسألة ٧ ـ لو علق اليمين على مشية الله تعالى بأن قال: «والله لأفعلن كذا إن شاء الله» و كان المقصود التعليق على مشيته تعالى لا مجرد التبرك بهذه الكلمة لا تنعقد حتى فيما كان المحلوف عليه فعل واجب أو ترك حرام، بخلاف ما اذا علق على مشية غيره بأن قال: «والله لأفعلن كذا إن شاء زيد» مثلاً، فانه تنعقد على تقدير مشيته، فان قال زيد: «أنا شئت أن تفعل كذا» انعقدت و يتحقق الحنث بتركه، و ان قال: «لم أشأ» لم تنعقد، ولو لم يعلم أنه شاء أولا لا يترتب عليه أثر وحنث، و كذا الحال لو علق على شيء آخر غير المشية، فانه تنعقد على تقدير حصول المعلق عليه، فيحنث لو لم يأت بالمحلوف عليه على ذلك التقدير.

مسألة ٨ ـ يعتبر في الحالف البلوغ و العقل و الاختيار و القصد و انتفاء الحجر في متعلقه، فلا تنعقد يمين الصغير و المجنون مطبقاً أو أدوارياً حال دوره و لا المكره و لا السكران، بل و لا الغضبان في شدة الغضب السالب للقصد و لا المحجور عليه فيما حجر عليه.

مسألة ٩ ـ لا تنعقد يمين الولد مع منع الوالد، و لا يمين الزوجة مع منع الزوج إلا أن يكون المحلوف عليه فعل واجب أو ترك حرام و كان المنع متوجهاً إليه، و أما إذا كان متوجهاً الى الحلف فلا يبعد عدم انعقاده، ولو حلفا في غير ذلك كان للأب أو الزوج حل اليمين و ارتفع أثرها، فلا حنث و لا كفارة عليه، و هل يشترط إذنهما و رضا هما في انعقاد يمينهما حتى أنه لو لم يطلعا على حلفهما أو لم يحلا مع علمهما لم تنعقد أصلاً أولا بل كان منعهما مانعاً عن انعقادها و حلهما رافعاً

Islam if I do or do not do so and so." So it shall not be effective in entailing expiation if case of its breach. Of course, such an oath is by itself forbidden, and the person taking it is a sinner without there being any difference between the cases of truth, falsehood, its breach or otherwise. Rather it is more cautious to hold its perpetrator liable to feed ten poor persons, providing each of them a *Mudd* and asking forgiveness of Allāh whose Rank is Exalted. Likewise, it does not take effect if, for example, one says: "If I do not do so and so I shall become a Jew or Christian."

Problem # 7. If a person makes his oath contingent on the Will of Allāh, as when one says: " By God, I shall do so and so, if He wills," and his intention by making it contingent on the Will of Allāh is not merely His Blessing by using such words, the oath shall not take effect, even if the act involved in the oath is the performance of an obligatory act or omission of a forbidden one, contrary to the case when he makes it contingent on the will of some one other than Allāh, as, for example, when one says: "By God, I shall so and so if Zayd wills, in which case it shall take effect with the supposition of Zad's will. So if Zayd says: " I like you to do so and so," the oath shall take effect, and its non-performance shall entail sin. If he says: "I do not like (you to do so and so)," it shall not take effect.

If he does not know whether Zayd likes it or not, it shall have no effect and shall not entail a sin.

Same shall be the case if one makes his oath contingent on something other than will, so that it shall take effect with the supposition of the thing having taken place, and he shall be considered to have sinned if he fails to perform what he has vowed.

Problem # 8. It is a condition for a person taking oath to be an adult, sane, having free will and intention and to be free from interdiction concerning the subject of the oath. So an oath by a minor or a lunatic is not constituted, whether the lunatic is suffering from perennial insanity or a periodical one and the oath is taken during a state of insanity. Nor is it constituted if taken under duress or intoxication or by an angry person in a state of extreme anger depriving him of intention, or by an interdicted person if it concerns the thing he has been interdicted from.

Problem # 9. An oath made by a son when forbidden by his father does not take effect, nor by a wife despite her husband's forbiddance except in case the oath involves the performance of an obligatory act or avoidance of a prohibited one and the forbiddance concerned it. If, however, the forbiddance related to the oath, then it is not far from being ineffective.

If a son or wife has taken oath in any other case, the father or husband shall be entitled to cancel it, in which case its effect shall be removed, and there shall be no sin or liability of expiation on the person making the oath. Now whether obtaining permission and consent of a father or husband is a

لاستمرارها فتصح و تنعقد في الصورتين المزبورتين؟ قولان، أولهما لا يخلو من رجحان، فحينئذ لا يبعد عدم الانعقاد بدون إذنهما حتى في فعل واجب أو ترك حرام، لكن لا يترك الاحتياط خصوصاً فيهما.

مسألة ١٠ ـ لا إشكال في انعقاد اليمين لو تعلقت بفعل واجب أو مستحب أو بترك حرام أو مكروه و في عدم انعقادها لو تعلقت بفعل حرام أو مكروه أو بترك واجب أو مستحب، و أما المباح المتساوي الطرفين في نظر الشرع فان ترجح فعله على تركه بحسب المنافع و الأغراض العقلائية الدنيوية أو العكس فلا إشكال في انعقادها إذا تعلقت بطرفه الراجح، و عدم انعقادها لو تعلقت بطرفه المرجوح، ولو ساوى طرفاه بحسب الدنيا أيضاً فهل تنعقد إن تعلقت به فعلاً أو تركاً؟ قولان، أشهر هما و أحوطهما أولهما، بل لا يخلو من قوة.

مسألة ١١ ـ كما لا تنعقد اليمين على ما كان مرجوحاً تنحل إن تعلقت براجح ثم صار مرجوحاً. ولو عاد إلى الرجحان لم تعد اليمين بعد انحلالها على الأقوى.

مسألة ١٢ ـ انما تنعقد اليمين على المقدور دون غيره، ولو كان مقدوراً ثم طرأ عليه العجز بعدها انحلت اذا كان عجزه في تمام الوقت المضروب للمحلوف عليه أو أبداً اذا كان الحلف مطلقاً، وكذا الحال في العسر والحرج الرافعين للتكليف.

مسألة ١٣ ـ اذا انعقدت اليمين وجب عليه الوفاء بها، و حرمت عليه مخالفتها، و وجبت الكفارة بحنثها، و الحنث الموجب للكفارة هي المخالفة عمداً، فلو كانت جهلاً أو نسياناً أو اضطراراً أو إكراهاً فلا حنث و لا كفارة.

مسألة ١٤ ـ لو كان متعلق اليمين فعلاً كالصلاة و الصوم فان عيّن له وقتا تعيّن، و كان الوفاء بها بالاتيان به في وقته، وحنثها بعدم الاتيان فيه و ان أتى به في وقت آخر، و ان أطلق كان الوفاء بها بايجاده في أيّ وقت كان ولو مرة واحدة، و حنثها بتركه بالمرة، و لا يجب التكرار و لا الفور والبدار، و يجوز له التأخير ولو بالاختيار الى أن يظن الفوت لظن طرو العجز أو عروض الموت، و ان كان متعلقها الترك كما اذا حلف أن لا يشرب الدخان مثلاً فان قيده بزمان

condition in the effectiveness of an oath, so that even if the father or husband is not informed by the oath of the son or wife or he has not cancelled it after obtaining knowledge about it, it shall not take effect all or otherwise; rather their forbiddance is an obstacle in the way of its taking effect and their cancellation terminated its continuance, and therefore in both the cases mentioned it shall be valid, there are two opinions, the former is not devoid of preference. At the same time its non-effectiveness is also not far from being the case without the permission of the father or husband even in the performance of an obligatory act or avoiding a prohibited one. In both cases, however, caution must not be given up.

Problem # 10. There is not hesitation in an oath taking effect if it concerns the performance of an obligatory or approved act or the avoidance of a forbidden or disapproved act. So also there is no hesitation in its not being effective if it concerns the performance of a forbidden or disapproved act or the omission of an obligatory or approved act. As regards its position in case of both sides of it being permissible from the point of view of *Sharī'at*, there shall be no hesitation in its taking effect if its performance is preferable to its omission according to the rational worldly benefits and interests or otherwise provided it concerns the preferred side and not taking effect if it concerns the non-preferred side, If both its side are equal from the worldly point of view, then whether it shall take effect if its performance or commission concerns so, there are two opinions on this point, the more prevalent and cautious being in favour of the former; rather it is not devoid of force.

Problem # 11. As an oath does not take effect if it concerns what is against preference, it also becomes cancelled if it at first concerns the preferred one then otherwise. If, however, it again reverts to the preferred one, according to the stronger opinion, it shall not be considered an oath once it is cancelled.

Problem # 12. An oath is effective if one has the capability to fulfil it. If at first one had the capability to fulfil it, but later becomes incapable subsequently, the oath shall be cancelled if his incapacity it continues throughout the period contained in the oath about what is sworn, or for ever if the oath was taken without mentioning any limit. The same shall be the rule in case of indigency or distress that removes the liability.

Problem # 13. Once an oath is constituted, it must be fulfilled, and its breach is forbidden, and expiation becomes obligatory if it is violated. The breach entailing expiation is its deliberate breach. If, however, the breach has taken place inadvertently or due to forgetfulness or emergency or under duress, it shall not be considered a breach and so there shall no expiation.

Problem # 14. If the subject of the oath is an act as prayers or fasting, then if some time is specified for it, it must be honoured, and its fulfilment shall take place by its performance at its due time, and its breach lies in failure to perform it [at its due time], even if it was performed at some other time. If no limit of time is specified in it, its fulfilment shall lie in its performance at any time, even if for once, and its breach shall be deemed to have taken place in case of non-performance even for once. It is not obligatory to perform it repeatedly, immediately or preferably. Delay in its performance is allowed, even if by one's own option, although there is fear of its omission due to occurrence of incapability or death, even it concerns abandonment, as, for example, when one swears not to smoke. Then if he has limited

كان حنثها بايجاده ولو مرة في ذلك الزمان، و ان أطلق كان مقتضاه التأبيد مدة العمر، فلو أتى به مدته ولو مرة تحقق الحنث.

مسألة ١٥ ـ لو كان المحلوف عليه الاتيان بعمل كصوم يوم سواء كان مقيداً بزمان كصوم يوم من شعبان أو مطلقاً لم يكن له إلا حنث واحد بتركه في الوقت المضروب أو مطلقاً، و كذلك اذا كان ترك عمل على الاطلاق سواء قيده بزمان أم لا، فالوفاء بها بتركه في الوقت المضروب أو مطلقاً، و حنثها بايقاعه ولو مرة واحدة، فلو أتى به حنث و انحلت اليمين، فلو أتى به مراراً لم يحنث إلا مرة واحدة، فلا تتكرر الكفارة، و الأقوى أن الأمر كذلك لو حلف على أن يصوم كل خميس، أو حلف أن لا يشرب الدخان كل جمعة، فلا يتكرر الحنث والكفارة لو ترك الصوم في أكثر من يوم، أو شرب الدخان في أكثر من جمعة، و تنحل اليمين بالمخالفة الأولى، و الاحتياط حسن.

مسألة ١٦ ـ كفارة اليمين عتق رقبة أو إطعام عشرة مساكين أو كسوتهم، فان لم يقدر فصيام ثلاثة أيام، و سيجيء تفصيلها في الكفارات ان شاء الله تعالى.

مسألة ١٧ ـ الأيمان الصادقة كلها مكروهة، سواء كانت على الماضي أو المستقبل، نعم لو قصد بها دفع مظلمة عن نفسه أو غيره من إخوانه جاز بلا كراهة ولو كذباً، بل ربما تجب اليمين الكاذبة لدفع ظالم عن نفسه أو عرضه أو عن نفس مؤمن أو عرضه، والأقوى عدم وجوب التورية و إن أحسنها.

مسألة ١٨ ـ الأقوى جواز الحلف بغير الله في الماضي و المستقبل و إن لم يترتب على مخالفته إثم و لا كفارة، كما أنه ليس قسماً فاصلاً في الدعاوي و المرافعات.

القول في النذر

مسألة ١ ـ النذر هو الالتزام بعمل لله تعالى على نحو مخصوص، و لا ينعقد

to a time, its breach shall take place by recourse to it, even if for once during the specified time. If the time unlimited, its time shall be deemed to spread to the whole lifetime, so that if he attempts it even once during that time, he shall be deemed to have broken the oath.

Problem # 15. If the subject of an oath is the performance of an act as fasting for one day, regardless whether it is confined to some particular time as the month of Sha'bān, or it is unlimited, he shall not be liable to a single breach if he fails to observe it at the specified time or absolutely. The same shall be the case when the condition of avoiding an act is made in general terms, regardless whether he has confined it to a particular time or not, its breach shall be deemed to have taken place when he fails to perform it at the prescribed time or absolutely, and its breach shall be deemed to have taken place by the performance of the act, even for once. So if he performs the act, he shall be considered to have broken the oath, and the oath shall thereby be broken. If he performs it repeatedly, he shall not be deemed to have broken the oath for more than once, and so the liability for expiation shall not be repeated. According to the stronger opinion, the same shall be the rule if he swears to keep fast every Thursday, or swears not to smoke every Friday, there shall be no repetition of breach of the oath and expiation if he fails to keep fast for more than one day or smokes for more than one Friday. The oath shall be cancelled by the first breach, but caution is better.

Problem # 16. The expiation for the breach of an oath is the emancipation of a slave or feeding and clothing ten poor persons. If one is not capable to do so, then he shall be required to keep fast for three days. God willing, its details shall be mentioned under the Section of Expiations.

Problem # 17. All the true oaths are disapproved, regardless whether they relate to the past or future. Of course, if one intends to rid himself or any one from among his brethren from a *Maẓlamah*, it shall be permissible without any disapproval. The same rule shall apply if the oath was false. Rather a false oath becomes obligatory if it is taken to avoid [the harm feared from] a tyrant for his person or his honour or the person of a believer or his honour. According to the stronger opinion, *Towriyah* (concealment, hypocrisy or dissimulation) is not obligatory, even if it was of the best type.

Problem # 18. According to the stronger opinion, it is permissible to take an oath upon other than Allāh relating to the past or future, although its breach entails no sin or expiation, as such an oath is not instrumental in deciding disputes and litigations.

Chapter Two – A Vow (*Nadhr*)

Problem # 1. A Vow (or *Nadhr*) is making oneself liable to Allāh, the Exalted for an act in a special manner. It does not take effect by mere intention, but has to be expressed in prescribed words that mean to make him liable to Allāh, the Exalted, for the performance or renunciation of an act, as when one says "I am liable to Allāh, for example, to keep fast or give up drinking wine." Whether it is a condition to use particularly the words "to Allāh", or it is permissible to use any other word from among

بمجرد النية، بل لابد من الصيغة، وهي ما كان مفادها جعل فعل أو ترك على ذمته لله تعالى، بأن يقول: لله عليّ أن أصوم أو أن أترك شرب الخمر مثلاً، و هل يعتبر في الصيغة قول: «لله» بالخصوص أو يجزي غير هذه اللفظة من أسمائه المختصة كما تقدم في اليمين؟ الظاهر هو الثاني، و لا يبعد انعقاده بما يرادف القول المزبور من كل لغة خصوصاً لمن لا يحسن العربية، ولو اقتصر على قوله: «عليّ كذا» لم ينعقد و إن نوى في ضميره معنى «لله» و لو قال: «نذرت لله أن أصوم» مثلاً أو «لله عليّ نذر صوم يوم» مثلاً لم ينعقد على إشكال، فلا يترك الاحتياط.

مسألة ٢ ـ يشترط في الناذر البلوغ و العقل و الاختيار و القصد وانتفاء الحجر في متعلق نذره، فلا ينعقد نذر الصبي و إن كان مميزاً و بلغ عشراً و لا المجنون ولو أدوارياً حال دوره، و لا المكره، و لا السكران، بل و لا الغضبان غضباً رافعاً للقصد، و لا السفيه المحجور عليه إن كان المنذور مالاً ولو في ذمته، و لا المفلس المحجور عليه إن كان المنذور من المال الذي حجر عليه و تعلق به حق الغرماء.

مسألة ٣ ـ لا يصح نذر الزوجة مع منع الزوج و إن كان متعلقا بمالها و لم يكن العمل به مانعاً عن حقه، بل الظاهر اشتراط انعقاده باذنه، ولو أذن لها فنذرت انعقد، و ليس له بعد ذلك حله ولا المنع عن الوفاء به، و لا يشترط نذر الولد باذن والده على الأظهر، و ليس له حله و لا منعه عن الوفاء به.

مسألة ٤ ـ النذر إما نذر بر و يقال له: نذر المجازاة، و هو ما علق على أمر إما شكراً لنعمة دنيوية أو أخروية كأن يقول: «إن رزقت ولداً فللّه عليّ كذا» أو «إن وفقت لزيارة بيت الله فللّه عليّ كذا» و إما استدفاعاً لبلية كأن يقول: إن شفى الله مريضي فللّه علي كذا، و إما نذر زجر، و هو ما علق على فعل حرام أو مكروه زجراً للنفس عن ارتكابها مثل أن يقول: «إن تعمدت الكذب أو بلت في الماء فللّه عليّ كذا» أو على ترك واجب أو مستحب زجراً لها عن تركهما، و إما نذر تبرع، و هو ما كان مطلقاً و لم يعلق على شيء، كأن يقول: «لله عليّ أن

His special Attributes as mentioned under the Chapter on Oath, apparently the second alternative is permissible. It is not far from its taking effect by using what is equivalent to the above words in any language particularly by one who does not know Arabic properly. If a person confines himself to saying: "I shall be liable for so and so", a vow shall not take effect, even if at heart he intends to mean "to Allāh". If, for example, one says: "I have vowed to Allāh to keep fast," or "I am liable to Allāh for vowing to keep fast a day," it shall not constitute a vow, although there is hesitation in accepting this rule, and, therefore, caution must not be given up.

Problem # 2. It is a condition that a person making a vow must be an adult, sane, having free will and intention and free from interdiction for the subject of his vow. So a vow made by a minor, even if he is discreet and has attained ten years of age, or by a lunatic, even having a periodical lunacy, if made during the state of lunacy, nor by one acting under duress or an intoxicated person, rather not even by an angry person when he is in anger depriving him of intention. It is also neither constituted by an interdicted idiot, if the subject of the vow is a property, even if owed by himself, nor by an interdicted insolvent if the subject of the vow is a property from which he is interdicted and is connected with the right of the creditors (*Ghuramā*).

Problem # 3. A vow made by a wife is not valid if her husband has forbidden [her from doing it], even if relates to her own property, and nothing precludes her from exercising her right; rather, apparently there is condition that the husband's permission is a condition for its validity. If the husband gives her permission and she makes a vow, it shall be valid, and the husband shall not be entitled to cancel it nor forbid her from fulfilling it. According to the more obvious opinion, there is neither a condition for a son in making vow to obtain the permission of his father, nor is the father entitled to cancel it or forbid him from fulfilling it.

Problem # 4. A vow is either a Vow of Piety (*Nadhr-al Birr)* and it is called a Vow of Requital (*Nadhr al-Mujāzāt*), a vow that is contingent on a matter of thanks for a blessing of this world or the next world, as when one says: " If I am blessed with a son then I shall owe to Allāh such and such," or " If I succeed in going on a pilgrimage to the House of Allāh (i.e., the Ka'bah), then I shall owe to Allāh such and such." Or it is meant to seek warding off an evil, as when one says: "If I am healed of my sickness, I shall owe to Allāh such and such." Or it is a Vow of Reprimand (*Nadhr-i Zajr*), and that is a vow contingent on the commission of a forbidden or disapproved act, as a reprimand to oneself for its commission, as when one says: "If I deliberately tell a lie, or make water in the water, I shall owe to Allāh such and such." Or it is reprimand for omitting an obligatory or approved act. Or it is a Vow of a Voluntary Act (*Tabarru'*), and that is an unconditional vow and it is not contingent on any thing, so when one says: " I owe to Allāh to keep a fast tomorrow." There is no objection and difference of opinion on the effectiveness of the first two types of vows, but as regards the effectiveness of the last one, there are two opinions, the stronger being in favour of its effectiveness.

أصوم غداً» لا إشكال و لا خلاف في انعقاد الأولين، و في انعقاد الأخير قولان، أقواهما الانعقاد.

مسألة ٥ ـ يشترط في متعلق النذر مطلقا أن يكون مقدوراً للناذر، و أن يكون طاعة لله تعالى صلاة أو صوماً أو حجاً و نحوها مما يعتبر في صحتها القربة، أو أمراً ندب إليه الشرع و يصح التقرب به كزيارة المؤمنين و تشييع الجنازة و عيادة المرضى و غيرها، فينعقد في كل واجب أو مندوب ولو كفائياً إذا تعلق بفعله، و في كل حرام أو مكروه إذا تعلق بتركه، و أما المباح كما إذا نذر أكل طعام أو تركه فان قصد به معنى راجحاً كما لو قصد بأكله التقوّي على العبادة أو بتركه منع النفس عن الشهوة فلا إشكال في انعقاده، كما لا إشكال في عدم الانعقاد فيما إذا صار متعلقه فعلا أو تركاً بسبب اقترانه ببعض العوارض مرجوحاً ولو دنيوياً، و أما إذا لم يقصد به معنى راجحاً و لم يطرأ عليه ما يوجب رجحانه أو مرجوحيته فالظاهر عدم انعقاده، لكن لا ينبغي ترك الاحتياط فيه.

مسألة ٦ ـ قد عرفت أن النذر إما معلق على أمر أولا، و الأول على قسمين: نذر شكر و نذر زجر، فليعلم أن المعلق عليه في نذر الشكر إما من فعل الناذر أو من فعل غيره أو من فعل الله تعالى، و لابد في الجميع من أن يكون أمراً صالحاً لأن يشكر عليه حتى يقع المنذور مجازاة له، فان كان من فعل الناذر فلابد أن يكون طاعة لله تعالى من فعل واجب أو مندوب أو ترك حرام أو مكروه، فيلتزم بالمنذور شكراً لله تعالى حيث وفقه عليها، فلو علقه شكراً على ترك واجب أو مندوب أو فعل حرام أو مكروه لم ينعقد، و إن كان من فعل غيره فلابد أن يكون فيه منفعة دينية أو دنيوية للناذر صالحة للشكر عليها شرعاً أو عرفاً، و لا ينعقد في عكسه، مثل أن يقول: «إن شاع بين الناس المنكرات فللّه عليّ كذا» و إن كان من فعل الله تعالى لزم أن يكون أمراً يسوغ تمنيه، و يحسن طلبه منه تعالى كشفاء مريض أو هلاك عدو ديني أو أمن في البلاد و نحوها فلا ينعقد في عكسه، كما إذا قال: إن أهلك الله هذا المؤمن الصالح أو قال: إن وقع القحط في البلاد

Problem # 5. It is an absolute condition in the subject of vow that the person vowing must be capable to fulfil it, and that it must be in obedience to Allāh irrespective of its being prayers, fasting,Ḥajj or the like in which the intention of seeking closeness [to Allāh] is a condition, or its being something has been approved by the Islamic law (*Sharī'at*), or through which it is lawful to seek closeness [to Allāh], as paying visit to believers, accompanying the funeral procession and paying visit to a patient, etc. It may be made in any obligatory or approved act, even if it is a [*Kafā'ī*] act [that if performed by any member exonerates others from the liability of its performance, provided that it concerns the performance of the act, or in any forbidden or disapproved act provided it concerns its avoidance. As regards a permissible (*Mubāḥ*) act, as when he vows to eat or avoid taking some food, then if he intends thereby something preferable, as when he intends by eating to gain strength for offering worship or avoiding it shall be a source of abstinence from lasciviousness, there shall be no objection in making a vow for it. Likewise, there is objection in its not being effective in case it concerns the performance of avoidance of an act that may lead to some disapproved result, although of a worldly nature. If, however, by its performance or avoidance neither any thing approved is intended nor it leads to something that is legally approved or disapproved, apparently it shall not take effect, but caution must not be given up in such case.

Problem # 6. It is already understood that a vow is either contingent on something or not. The first type has two kinds, namely, a vow for thanks or a vow for reprimand. Now it must be understood that a vow for thanks either relates to an act by the person vowing, or by another person or by Allāh, the Exalted. In all these cases it must be some act of piety so that the vowed thing may lead to thanks in recompense. If it relates to an act by the person vowing, it is indispensable to be in obedience to Allāh, the Exalted in the form of performance of an obligatory or approved act or avoidance of a forbidden or disapproved act. So he is bound to thank Allāh, the Exalted, for enabling him to do it. If it is contingent on the avoidance of an obligatory or approved act or the performance of a forbidden or disapproved act, the vow shall not take effect. If it relates to performance of an act by another person, it is indispensable to be something having some benefit of this world or in the next world for the person vowing suitable for offering thanks for it according to the Islamic law or the prevalent custom. The vow does not take effect in case otherwise, as, for example, if he says: "If evil prevails among the people, I shall do so and so for Allāh. If it relates to an act by Allāh, the Exalted, it is necessary that it must be something whose desire is legally allowed and it is good to ask for from Allāh, the Exalted, as restoration of health of a patient or destruction of an enemy of faith or peace of the place, or the like, so that it does not take effect in case otherwise, as when one says: "If Allāh destroys this believer," or "If famine takes place in the towns. I shall do so and so [for Allāh]".

As regards a vow for reprimand, it is indispensable that the condition or the subject of the vow must be the performance or avoidance of an act that is within the power of the person making the vow, and he may be capable of turning himself away from it, so that the vow may keep him away from that act, as the commission of a forbidden or disapproved act or the avoidance of an obligatory or approved

فكذا، و أما نذر الزجر فلابد و أن يكون الشرط و المعلق عليه فعلاً أو تركاً اختيارياً للناذر، و كان صالحاً لأن يزجر عنه حتى يقع النذر زاجراً عنه، كفعل حرام أو مكروه أو ترك واجب أو مندوب.

مسألة ٧ ـ إن كان الشرط فعلاً اختيارياً للناذر فالنذر المعلق عليه قابل لأن يكون نذر شكر و أن يكون نذر زجر، و المائز هوالقصد، مثلاً لو قال: «إن شربت الخمر فللّه عليّ كذا» و كان في مقام زجر النفس و صرفها عن الشرب و انما أوجب على نفسه شيئاً على تقدير شربه ليكون زاجراً عنه، فهو نذر زجر فينعقد، و إن كان في مقام تنشيط النفس و ترغيبها و قد جعل المنذور جزاءً لصدوره منه و تهيؤ أسبابه له كان نذر شكر، فلا ينعقد.

مسألة ٨ ـ لو نذر الصلاة أو الصوم أو الصدقة في زمان معين تعين، فلو أتى بها في غيره لم يجز، و كذا لو نذرها في مكان فيه رجحان، فلا يجزي في غيره و إن كان أفضل، ولو نذرها في مكان ليس فيه رجحان ففي انعقاده و تعينه و جهان بل قولان، أقواهما الانعقاد، نعم لو نذر إيقاع بعض فرائضه أو بعض نوافله الراتبة كصلاة الليل أو صوم شهر رمضان مثلاً في مكان أو بلد لا رجحان فيه بحيث لم يتعلق النذر بأصل الصلاة و الصيام بل بايقاعهما في المكان الخاص فالظاهر عدم انعقاده، هذا إذا لم يطرأ عليه عنوان راجح مثل كونه أفرغ للعبادة أو أبعد عن الرياء و نحو ذلك ، و إلا فلا إشكال في الانعقاد.

مسألة ٩ ـ لو نذر صوماً و لم يعين العدد كفى صوم يوم، ولو نذر صلاة و لم يعين الكيفية و الكمية فلا يبعد إجزاء ركعة الوتر إلا أن يكون قصده غير الرواتب، فلا يجزي إلا الا تيان بركعتين، ولو نذر صدقة ولم يعين جنسها و مقدارها كفى أقل مايتناوله الاسم، ولو نذر أن يأتي بفعل قربي يكفي كل ما هو كذلك ولو تسبيحة واحدة أو الصلاة على النبي و آله صلوات الله عليهم أو التصدق بشيء إلى غير ذلك .

مسألة ١٠ ـ لو نذر صوم عشرة أيام مثلاً فان قيد بالتتابع أو التفريق تعين، و

act.

Problem # 7. If the condition of the vow relates to an act within the power of the person vowing, then the vow contingent on it can be a vow for thanks or a vow for reprimand. It is the intention that causes distinction between them. So if, for example, one says : " If I drink wine, I shall be liable before Allāh to do so and so," it shall be as a reprimand to oneself and turning oneself away from it, and he has bound himself to be liable for something on supposing to drink wine so that it may restrain him from it, and so it shall be a vow for reprimand, and shall, therefore, take effect. If it is meant for pleasing or persuading oneself, and make the subject of vow a recompense for its commission and providing means for it, it shall be a vow for thanks, and so it shall not take effect.

Problem # 8. If a person vows to offer prayers or keep fast or give charity at a definite time, the time shall be binding for him. If he fulfils the vow at some other time, it shall not be permissible. Likewise, if he vows to fulfil it at a definite place that if preferable, it shall not be permissible for him to fulfil it at another place, even if was a superior place. If he has vowed to fulfil it at a place that has no preference, then there are two alternative, or rather two opinions about its taking effect and declaring it binding, the stronger being in favour of its taking effect. If one vows to perform some obligatory or supererogatory acts as, for example, prayers at night or fasting during the month of Ramaḍān in a place or town having no preference in it, in a way that the vow does not relate to the prayer or fasting itself, but to fulfil it at a particular place, then apparently the vow shall not take place. This is the case when preferable quality does not apply to it as being a solitary place suitable for worship or far from hypocrisy, or the like; otherwise, there shall be no hesitation in its taking effect.

Problem # 9. If a person vows to keep fast but does not specify its number, it shall be sufficient to keep fast for a day. If, however, he vows to offer prayer, but does not specify its nature or number, then it shall not be far from being sufficient to offer a *Rak'at of Vitr*, except when he intends to offer some other kind of prayer, in which case it shall not be permissible except offering two *Rak'ats*. If a person vows to give charity, but does not determine its kind or amount, it shall be sufficient to give the minimum nominal one. If a person vows to perform an act for seeking closeness [to Allāh], it shall be sufficient to perform any act of such type, as a single round of rosary or sending *Ṣalāt* on the Prophet and his Progeny, Allāh's Blessings be on them, or offer anything as charity, or do any thing else.

Problem # 10. If a person vows to keep fast, for example, for ten days, then if he has specified it to be continuous or with intervals, well and good. Otherwise, he shall make an option between them. Likewise, if one vows to keep fast for a year, then if it is unspecific, then apparently it shall be sufficient keep fast for twelve months, even if with intervals. Similarly, if one vows to keep fast for a month, then it is sufficient to keep fast for thirty days, even with intervals, as it is sufficient to keep fast between the sight of two moons of a month even if it has a number of days shorter than thirty days. He can also

إلا تخير بينهما، و كذا لو نذر صيام سنة فان الظاهر مع الاطلاق كفاية إثني عشر شهراً ولو متفرقاً، بل و كذا لو نذر صيام شهر يكفي ظاهراً صيام ثلاثين يوماً ولو متفرقاً، كما يكفي صوم ما بين الهلالين من شهر ولو ناقصاً، و له أن يأتي بالشهر ملفقاً، فيشرع في أثناء شهر و يكمل من الثاني مقدار ما مضى من الشهر الأول، نعم لو أتى به متفرقاً لايجوز الاكتفاء بمقدار الشهر الناقص.

مسألة ١١ ـ لو نذر صيام سنة معينة استثني منها العيدان، فيفطر فيهما و لا قضاء عليه، و كذا يفطر في الأيام التي عرض فيها ما لا يجوز معه الصيام من مرض أو حيض أو نفاس أو سفر، لكن يجب القضاء على الأقوى.

مسألة ١٢ ـ لو نذر صوم كل خميس مثلاً فصادف بعضها أحد العيدين أو أحد العوارض المبيحة للافطار من مرض أو حيض أو نفاس أو سفر أفطر، و يجب عليه القضاء على الأقوى في غير العيدين و السفر، و على الأحوط فيهما و إن لا يخلو من قوة بالنسبة إلى العيدين.

مسألة ١٣ ـ لو نذر صوم يوم معين فأفطره عمداً يجب قضاؤه مع الكفارة.

مسألة ١٤ ـ لو نذر صوم يوم معين جاز له السفر و إن كان غير ضروري، و يفطر ثم يقيضه و لا كفارة عليه.

مسألة ١٥ ـ لو نذر زيارة أحد الأئمة عليهم السلام أو بعض الصالحين لزم، و يكفي الحضور و السلام على المزور، والظاهر عدم وجوب غسل الزيارة و صلاتها مع عدم ذكرهما فيه، و إن عين إماماً لم يجز غيره و إن كانت زيارته أفضل، كما أنه لو عجز عن زيارة من عينه لم يجب زيارة غيره بدلاً عنه، و إن عين للزيارة زماناً تعين، فلو تركها في وقتها عامداً حنث و تجب الكفارة، و الأقوى عدم وجوب القضاء.

مسألة ١٦ ـ لو نذر أن يحج أو يزور الحسين عليه السلام ماشياً انعقد مع القدرة و عدم الضرر، فلو حج أو زار راكباً مع القدرة على المشي فان كان النذر مطلقا و لم يعيّن الوقت أعاد ماشياً، و إن عين وقتاً وفات عمداً حنث و عليه

divide it between two months, so that he may start keeping fast during a month and complete it out of the next month what has been left incomplete from the first month. If, however, he keeps fast with intervals, it is not sufficient to keep fast up to the number of days of a shorter month [i.e., a month having less than thirty days].

Problem # 11. If a person vows to fast for a specific year, both the *Eids* [i.e., *Eid al-Fiṭr* and *Eid al-Aḍḥā*] shall be excluded from it, so that he shall be allowed not to fast on those two *Eids*, and he shall not be required to make amends for it. Likewise, he shall not keep fast during the days in which something happens to him/her in which fasting is not allowed, as sickness, menses, puerperal blood or journey, but, according to the stronger opinion, he shall be bound to make amends for it.

Problem # 12. If a person vows to keep fast, for example, every Thursday, and some of the Thursdays may coincide with one of the two *Eids*, or a happening in which it is allowed not to keep fast, as sickness, menses, puerperal blood or journey, he shall not fast [on such Thursdays], but, according to the stronger opinion, he shall be bound to make amends for it except in case of the two *Eids* or journey, and according to the more cautious opinion, he shall be bound to make amends for such Thurdays too, though the exemption is not devoid of force in case of the two *Eids*.

Problem # 13. If a person vows to keep fast on a specific day, but he breaks the fast deliberately, he shall be bound to compensate and expiate.

Problem # 14. If a person vows to keep fast on a specific day, he shall be allowed to make a journey on that day, even it is an unnecessary one, and to break the fast and then compensate, but he shall not be bound to expiate.

Problem # 15. If a person vows to make a pilgrimage to the shrines of any of the Imāms, A.S., or one of the pious persons, it shall be binding on him, and it shall be sufficient to visit such shrine and pay homage to the person to whom the shrine belongs. Apparently he is not bound to take a bath for pilgrimage or offer its prayer in case he has not mentioned them in his vow. If he has specified the Imām, he shall not be allowed to make a pilgrimage to one other than the specified Imām, even if the latter enjoys superiority over the former, in the same way as in case he is unable to make a pilgrimage to the shrine of the specified Imām, he shall not be bound to make a pilgrimage to the shrine of another as an alternative. If a person has specified a particular time for making the pilgrimage, it shall be binding on him. So if he fails to make the pilgrimage on the specified time deliberately, he shall be considered to have broken his vow, and so he shall be bound to expiate, though, according to the stronger opinion, he shall not be bound to make amends for it.

Problem # 16. If a person vows to perform Ḥajj or visit the shrine of Imām Ḥusayn,A.S., on foot, it shall take effect, provided that he has the capability to do so and there is no harm in it. If a person performs Ḥajj or a pilgrimage while riding on an animal [or a vehicle] although having the capability to do so on foot, then if the vow was unspecific without mentioning any time, he shall repeat it on foot. If he has specified a particular time for it, and the time lapses, he shall be considered to have broken his vow and shall be bound to expiate, but, according to the stronger opinion, he shall not be bound to make amends for it. The same shall be the rule if he traverses part of the way while riding and partly on foot.

الكفارة، و الأقوى عدم وجوب القضاء، و كذلك الحال لو ركب في بعض الطريق و مشى في بعضه.

مسألة ١٧ - ليس لمن نذر الحج أو الزيارة ماشياً أن يركب البحر أو يسلك طريقاً يحتاج إلى ركوب السفينة و نحوها ولو لأجل العبور من الشط و نحوه، ولو انحصر الطريق في البحر فان كان كذلك من أول الأمر لم ينعقد إلا إذا كان مراده فيما يمكن المشي، فيجب في سائر الطريق، و إن طرأ ذلك بعد النذر فان كان مطلقاً و توقع المكنة من طريق البرّ و المشي منه فيما بعد انتظر، و إن كان معيناً و طرأ ذلك في الوقت أو مطلقاً ولم يتمكن مطلقا سقط عنه ولا شيء عليه.

مسألة ١٨ - لو طرأ لناذر المشي العجز عنه في بعض الطريق دون بعض فالأحوط لو لم يكن الأقوى أن يمشي مقدار ما يستطيع و يركب في البعض، والأحوط الأولى سياق بدنة في نذر الحج، ولو اضطر إلى ركوب السفينة فالأحوط أن يقوم فيها بقدر الامكان.

مسألة ١٩ - لو نذر التصدق بعين شخصية تعينت، و لا يجزي مثلها أو قيمتها مع وجودها، و مع التلف فان كان لا باتلاف منه انحل النذر و لا شيء عليه، و إن كان باتلاف منه ضمنها بالمثل أو القيمة على الأحوط فيتصدق بالبدل، و يكفر أيضاً على الأقوى إن كان الا تلاف اختيارياً عمدياً.

مسألة ٢٠ - لو نذر الصدقة على شخص معين لزم، ولا يملك المنذور له الابراء منه، فلا يسقط عن الناذر بابرائه، و لا يلزم على المنذور له القبول، فان امتنع عنه لا يبعد عدم انحلال النذر إلا اذا امتنع في تمام الوقت المضروب له في الموقت و مطلقا في غيره، فلو رجع عن امتناعه في الموقت قبل خروج وقته و في غيره يجب التصدق عليه، نعم لو كان نذره الصدقة بعين معينة فامتنع عن قبولها جاز له إتلافها، و لا ضمان عليه لو رجع و لا كفارة، ولو مات الناذر قبل أن يفي بالنذر يخرج من أصل تركته، و كذا كل نذر تعلق بالمال كسائر الواجبات المالية ولو مات المنذور له قبل أن يتصدق عليه قام وارثه مقامه على احتمال

Problem # 17. A person who vows to perform Ḥajj or make a pilgrimage is not allowed to sail on the sea or adopt a route where he has to board a ship or the like, although for crossing a river or the like. If the sole route is through a sea, then if it was so from the outset, the vow shall not take effect, except when he intended to travel on foot as far as possible, in which case he shall be bound to go on foot in the rest of the way. If it has turned out after making the vow, then if the vow was unspecific, and it is hoped that after some time it shall be possible to go by the land route and traverse it on foot, he shall wait [till such time it becomes possible]. If the time for the vow is specific and the hurdle has taken place coincidentally, or the vow is unspecific, and it is not possible to go on foot at any time, the vow shall drop, and he shall be under no liability.

Problem # 18. If a person who has vowed [to perform Ḥajj or pilgrimage] on foot becomes unable to do so in part of the way after traversing part of the way [on foot], then, according to the more cautious, although not stronger, opinion, he must traverse the way on foot as far as possible and the rest while riding. It is also according to the more cautious and preferable opinion that he must also take the sacrificial camel along with himself in case of a vow for Ḥajj, and if he cannot do without boarding a ship, then it is more cautious for him to keep standing in it as long as possible.

Problem # 19. If a person vows to give a particular thing in charity, it shall be binding on him, and he is not allowed to give something else or its price as an alternative despite the existence of the vowed thing. In case it is destroyed, then if it is not destroyed due to his fault, the vow shall be cancelled and he shall be under no liability for it. If it was destroyed to his fault, according to the more cautious opinion, he shall be liable to give something identical or its price in charity as an alternative, and, according to the stronger opinion, he shall also expiate if the destruction was deliberate and of his own accord.

Problem # 20. If a person vows to give charity to a particular person, it shall be binding on him, the person to whom he has vowed to give charity is not entitled to absolve him of the liability, and the liability is not waived off by his absolving him. However, a person to whom he has vowed to give charity is not bound to accept it. If he does not accept it, it shall not be far from being cancelled, except when he rejects it throughout the period specified in the vow containing a specific time, and absolutely in case otherwise. If he withdraws his rejection before the lapse of the prescribed time in a specific vow or otherwise, he shall be bound to give him the charity. Of course, if his vow relates the charity of a specific thing and the person to whom it is to be given does not accept it, he may destroy it, so that if the person withdraws his rejection, he shall neither be held responsible for it nor bound to expiate. If a person making a vow dies before fulfilling it, it shall be executed from his original property. Similarly all vows of financial nature are to be treated as financial obligations. If the person to whom the charity is to be given dies before receiving it, his heir shall succeed him in whose case likelihood is according to the

مطابق للاحتياط سيا إذا كان متعلق النذر إعطاء شيء معين فمات قبل قبضه.

مسألة ٢١ ـ لو نذر شيئاً لمشهد من المشاهد المشرفة صرفه في مصالحه كتعميره و ضيائه و طيبه و فرشه، و الأحوط عدم التجاوز عن نحو تلك المصالح، ولو نذر شيئاً للامام عليه السلام أو بعض أولاده فالظاهر جواز صرفه في سبل الخير بقصد رجوع ثوابه إلى المنذور له، من غير فرق بين الصدقة على المساكين وإعانة الزائرين و غيرهما من وجوه الخير كبناء المسجد و القنطرة و نحو ذلك، و إن كان الأحوط الاقتصار على معونة زوارهم وصلة من يلوذ بهم من المجاورين المحتاجين و الصلحاء من الخدام المواظبين بشؤون مشاهدهم و إقامة مجالس تعزيتهم، هذا إذا لم يكن في قصد الناذر جهة خاصة أو انصراف إلى جهة خاصة، و إلا اقتصر عليها.

مسألة ٢٢ ـ لو عين شاة للصدقة أو لأحد الأئمة عليهم السلام أو لمشهد من المشاهد و نحو ذلك يتبعها نماؤها المتصل كالسمن، و أما المنفصل فلا يترك الاحتياط في الحمل و اللبن، بل لا يخلو من وجه، و أما النتاج الموجود قبل النذر و اللبن المحلوب كذلك فلمالكه.

مسألة ٢٣ ـ لو نذر التصدق بجميع ما يملكه لزم، فان شق عليه قوّم الجميع بقيمة عادلة على ذمته و تصرف في أمواله بماشاء و كيف شاء ثم يتصدق عما في ذمته شيئاً فشيئاً و يحسب إلى أن يوفي التمام، فان بقي منه شيء أوصى بأن يؤدى مما تركه بعد موته.

مسألة ٢٤ ـ لو عجز الناذر عن المنذور في وقته إن كان موقتاً و مطلقا إن كان مطلقاً انحل نذره و سقط عنه و لا شيء عليه، نعم لو نذر صوماً فعجز عنه تصدق عن كل يوم بمد من طعام على الأقوى، و الأحوط مدان.

مسألة ٢٥ ـ النذر كاليمين في أنه إذا تعلق بايجاد عمل من صوم أو صلاة أو صدقة أو غيرها فان عين له وقتاً تعين، و يتحقق الحنث، و تجب الكفارة بتركه فيه، فان كان صوماً يجب قضاؤه على الأقوى، و إن كان صلاة يقضيها على

caution, specially when the subject of the vow related to giving a particular thing [in charity] and the person dies before receiving it.

Problem # 21. If he vows something [to spend] for any of the holy mausoleums, he shall spend it for its betterment, as its repairs, lighting, sanitation and carpeting, and it is more cautious not to exceed the limits of such betterments. If he vows to give something for the Imām, A.S., or any of his descendants, then apparently it shall be permissible to spend it on charitable purposes in order that its reward may revert to the person for whom the vow has been made, without there being any difference in spending the charity on the poor and providing help to the pilgrims, etc. out of the funds for charitable purposes as construction of a mosque, a bridge or the like, although it is more cautious to confine it to providing help to the pilgrims or succour to those from among the needy caretakers and the pious among the servants taking care of the affairs of the mausoleums and arranging mourning gatherings for them. This is the case when there is no particular direction or reversion to it in the intention of the person making the vow; otherwise, it shall be limited to that intention.

Problem # 22. If a person has specified a sheep for charity or for any of the Imāms, A.S., or any of the holy mausoleums, or the like, it shall also apply to any growth attached to it as fatness. But as regards the separate growth caution must not be given up in case of a foetus or milk; rather it is not devoid of preference. As regards the produce prior to making the vow or the milk trickled earlier, it shall belong to the master.

Problem # 23. If a person vows to give charity all his belongings, it shall be binding on him. If, however, it is cumbersome for him, he shall determine justly the price of what he is liable to give in charity and then make use of his property as he likes, and then give in charity what he is liable to give in charity one after another, and keep its account until his entire liability is over. If something remains due, he shall make a will to be paid out of his property after his death.

Problem # 24. If a person is unable to fulfil at its proper time what he has vowed in case the vow contained a specific time, or absolutely if it contained no specific time, his vow shall be nullified and he shall be exonerated from its fulfilment and he shall be under no liability for it. Of course, if he has vowed to keep fast, but is unable to do so, according to the stronger opinion, he shall give in charity a *Mudd* of food per day, and to be more cautious two *Mudds*.

Problem # 25. A vow is like an oath as it relates to the performance of an act, as keeping fast, or offering prayer or giving something in charity, etc. So if he has specified a time for it, it shall be followed strictly, and in case it is not fulfilled at its proper time it shall mean its breach and entail the obligation of expiation. If it was a fast, according to the stronger opinion, he shall be bound to make amends for it. If it was prayer, according to the more cautious opinion, he shall compensate for it. But as regards the vows for other than these two, apparently there shall be no obligation for its compensation. If the time for its fulfilment is not specified, the time for its fulfilment shall be his whole lifetime, in which case he is

الأحوط، وأما غيرهما فالظاهر عدم وجوبه، وإن كان مطلقاً كان وقته العمر، و جاز له التأخير إلى أن يظن بالوفاة فيتضيق، و يتحقق الحنث بتركه مدة الحياة، هذا إذا كان المنذور فعل شيء، و إن كان ترك شيء ففي الموقت حنثه بايجاده فيه ولو مرة، و في المطلق بايجاده مدة حياته ولو مرة، ولو أتى به تحقق الحنث و انحل النذر كما مر في اليمين.

مسألة ٢٦ ـ انما يتحقق الحنث الموجب للكفارة بمخالفة النذر اختياراً فلو أتى بشيء تعلق النذر بتركه نسياناً أو جهلاً أو اضطراراً أو إكراهاً لم يترتب عليه شيء، بل الظاهر عدم انحلال النذر به، فيجب الترك بعد ارتفاع العذر لو كان النذر مطلقاً أو موقتاً و قد بقي الوقت.

مسألة ٢٧ ـ لو نذر إن برأ مريضه أو قدم مسافره صام يوماً مثلاً فبان أن المريض برأ و المسافر قدم قبل النذر لم يلزم.

مسألة ٢٨ ـ كفارة حنث النذر ككفارة من أفطر يوماً من شهر رمضان على الأقوى.

القول في العهد

لا ينعقد العهد بمجرد النية، بل يحتاج إلى الصيغة على الأقوى، و صورتها عاهدت الله أو علي عهدالله، و يقع مطلقاً و معلقاً على شرط كالنذر، و الظاهر أنه يعتبر في المعلق عليه إن كان مشروطاً ما اعتبر فيه في النذر المشروط، وأما ما عاهد عليه فهو بالنسبة إليه كاليمين يعتبر فيه أن لا يكون مرجوحاً ديناً أو دنياً، و لا يعتبر فيه الرجحان فضلاً عن كونه طاعة، فلو عاهد على فعل مباح لزم، ولو عاهد على فعل كان تركه أرجح أو على ترك أمر كان فعله أولى ولو من جهة الدنيا لم ينعقد، ولو لم يكن كذلك حين العهد ثم طرأ عليه ذلك انحل.

مسألة ـ مخالفة العهد بعد انعقاده توجب الكفارة، و الأظهر أن كفارتها كفارة من أفطر يوماً من شهر رمضان.

allowed to delay its fulfilment until he apprehends approaching death, in which case it shall become shorter, and if it is left for the whole life, it shall be deemed to have committed breach of the vow. This is the case when what is vowed is the performance of something. If it relates to the avoidance of an act, then in case its time is specified, the breach of the vow shall be deemed to have taken place by the commission of the act, even for once [during the specified time]. If the vow does not contain any specific time [for the fulfilment of the vow], then the breach of the vow shall be deemed to have taken place by the commission of the act during his lifetime even for once. If he commits the act, it shall mean breach of the vow, and the vow shall be cancelled, as has already been mentioned under the Chapter on Oath.

Problem # 26. A breach of vow entailing expiation takes place when it is violated of one's own accord. If, however, the person commits some thing that he is required to avoid according to his vow forgetfully, ignorantly, out of emergency or under duress, it shall not entail any liability on him; rather apparently there shall be no cancellation of the vow. So he shall be bound to avoid it after the removal of the excuse if the vow contained no limitation of time, or when there was a specific time but there is still time left [for its fulfilment].

Problem # 27. If a person vows that if his patient recovers from illness or his traveller returns from the journey, he shall, for example, keep fast for a day, and later it transpires that the patient had recovered or the traveller had returned from the journey prior to making the vow, he shall not be bound by the vow.

Problem # 28. According to the stronger opinion, the expiation for breach of a vow is like that for the person who breaks the fast for a day during the month of Ramaḍān.

Chapter Three – Pledge (*'Ahd*)

A Pledge (*'Ahd*) is not constituted by mere intention (*Niyyat*), but according to the stronger opinion it requires special words or formula (*Ṣīghah*), and its form is [the following]: "I have made a pledge to Allāh," or "I owe Pledge to Allāh." Like a vow, it takes effect both without any condition or contingent on a condition. In case of a pledge contingent on a condition, the same conditions are required as in case of a conditional vow. As regards the pledged thing, like an oath, it is a condition that it must not be disapproved from the point of view of this world or the next world, and it is not a condition that it must have preference, let alone its seeking the obedience [of Allāh]. If he pledges to do some permissible (*Mubāḥ*] act, he shall be bound by it. If he pledges to do an act whose avoidance is preferable, or to avoid an act whose performance was better, even if from the worldly point of view, it shall not be constituted. If it is not so at the time of making the pledge and it becomes so subsequently, it shall be cancelled.

Problem. Violation of a pledge once it is constituted shall entail expiation. Apparently its expiation is that of breaking a fast for a day during the month of Ramaḍān.

كتاب الكفارات

القول في أقسامها

و هي على أربعة أقسام: مرتبة، و مخيرة، و ما اجتمع فيه الأمران، و كفارة الجمع، أما المرتبة فهي ثلاث: كفارة الظهار، و كفارة قتل الخطأ، يجب فيهما العتق فان عجز فصيام شهرين متتابعين فان عجز فاطعام ستين مسكيناً، و كفارة من أفطر يوما من قضاء شهر رمضان بعد الزوال، و هي إطعام عشرة مساكين فان عجز فصيام ثلاثة أيام، و الأحوط كونها متتابعات.

و أما المخيرة فهي كفارة من أفطر في شهر رمضان بأحد الأسباب الموجبة لها، و كفارة حنث النذر، و كفارة حنث العهد، و كفارة جز المرأة شعرها في المصاب، و هي العتق أو صيام شهرين متتابعين أو إطعام ستين مسكيناً مخيراً بينها على الأظهر.

و ما اجتمع فيه الأمران كفارة حنث اليمين، و كفارة نتف المرأة شعرها و خدش وجهها في المصاب، وشق الرجل ثوبه في موت ولده أوزوجته، فيجب في جميع ذلك عتق رقبة أو إطعام عشرة مساكين أو كسوتهم مخيراً بينها، فان عجز عن الجميع فصيام ثلاثة أيام.

و أما كفارة الجمع فهي كفارة قتل المؤمن عمداً و ظلماً، و كفارة الافطار في شهر رمضان بالمحرم على الأحوط، و هي عتق رقبة مع صيام شهرين

SECTION THIRTY-TWO

EXPIATIONS [*KAFFĀRĀT*]

Chapter One – Kinds of Expiations (*Kaffārāt*)

Expiations (*Kaffārāt*) are of four kinds, namely, Sequential (*Murattabah*), Optional (*Mukhayyarah*), containing both Sequential and Optional kinds, and Combined one (*Jam'*).

I. A Sequential (*Murattabah*) expiation is of three categories, namely, Expiation for *Ẓihār*, and Culpable Homicide not amounting to Murder (*Qatl al-Khaṭā'*). In both cases, the liable person is bound to emancipate a slave ['*Itq*]. In case of his inability [to emancipate a slave], he shall be bound to keep fast for two consecutive months. In case of his inability to so, he shall be bound to feed sixty poor persons. The third category is that of the expiation for breaking the fast of a day during the month o 'Ramaḍān after noon, and that is feeding ten poor persons. In case of his inability to do so, he shall keep fast for three days, and to be more cautious, they must be kept consecutively.

2. An Optional (*Mukhayyarah*) Expiation is an Expiation of a person who breaks a fast during the month of Ramaḍān by one of the reasons leading to the breach of the fast, namely, an expiation for the breach of a vow, an expiation for the breach of a pledge and an expiation for a woman's tearing her hair in the event of distress, and that is emancipation of a slave ('*Itq*) or keeping fast for two consecutive months or feeding sixty poor persons, having apparently the right to opt any of these three expiations.

3. An Expiation containing both the two kinds, namely, the Sequential and the Optional ones are an expiation for breach of oath, an expiation for a woman's tearing her hair and bruising her face in the event of distress, a man's tearing his clothes on the death of his son or wife. In each of these case the expiation is emancipation of a slave, or feeding or clothing ten poor persons having an option between both of the expiations. In case of inability to make any of these expiations, the person shall keep fast for three days.

4. A Combined Expiation is the expiation for a deliberate and cold blooded murder of a believer and an expiation for breaking a fast during the month of Ramaḍān, to be more cautious by something forbidden, and that is emancipation of a slave accompanied by keeping fast for two consecutive months and feeding sixty poor persons.

Problem # 1. There is no difference in a woman's tearing her hair whether she tears all her hair or some of them as may be deemed tearing her hair according to the usual custom, as also there is no

متتابعين و إطعام ستين مسكيناً.

مسألة ١ ـ لا فرق في جزّ المرأة شعرها بين جزّ تمام شعر رأسها أو جزّ بعضه بما يصدق عرفاً أنها جزّت شعرها، كما لا فرق بين كونه في مصاب زوجها و مصاب غيره، و بين القريب و البعيد، و الأقوى عدم إلحاق الحلق و الاحراق به و إن كان أحوط سيّما في الأول.

مسألة ٢ ـ لا يعتبر في خدش الوجه خدش تمامه، بل يكفي مسماه نعم الظاهر أنه يعتبر فيه الإدماء، و لا عبرة بخدش غير الوجه ولو مع الادماء، و لا بشق ثوبها و إن كان على ولدها أو زوجها، كما لا عبرة بخدش الرجل وجهه و لا بجز شعره و لا بشق ثوبه على غير ولده و زوجته، نعم لا فرق في الولد بين الذكر و الأنثى، و في شموله لولد الولد تأمل، و الأحوط ذلك في ولد الابن، و الظاهر عدم الشمول لولد البنت و إن كان أحوط، و لا يبعد شمول الزوجة لغير الدائمة سيّما إذا كانت مدتها طويلة.

القول في أحكام الكفارات

مسألة ١ ـ لا يجزي عتق الكافر في الكفارة مطلقا، فيشترط فيه الاسلام، و يستوي في الإجزاء الذكر و الأنثى و الكبير و الصغير الذي هو بحكم المسلم بأن كان أحد أبويه مسلماً، لكن لا ينبغي ترك الاحتياط في كفارة القتل بعتق البالغ، و يشترط أيضاً أن يكون سالماً من العيوب التي توجب الانعتاق قهراً كالعمى و الجذام و الاقعاد و التنكيل، ولا بأس بسائر العيوب، فيجزي عتق الأصم و الأخرس و غير هما، و يجزي عتق الآبق و إن لم يعلم مكانه ما لم يعلم موته.

مسألة ٢ ـ يعتبر في الخصال الثلاث أي العتق و الصيام و الاطعام النية المشتملة على قصد العمل و قصد القربة و قصد كونه عن الكفارة، و تعيين

difference between the distress of a woman or that of some one else, and whether it relates to a close relative or a remote one. According to the stronger opinion, it does not include shaving and burning the hair, although to be more cautious to include the former one.

Problem # 2. It is not a condition in bruising the face to bruise the entire face, but it is sufficient if it is deemed as bruising the face. Of course, bleeding is also a condition in it, but it shall not include bruising any part of the body other than the face even if it is accompanied by bleeding. Nor shall it include the tearing of clothes even if it was on the death of the woman's son or husband, in the same manner as it does not include a man's bruising his face, tearing his hair or his clothes on the death of some one other than his son or wife. Of course, there is no difference between the child being a male or a female. There is, however, some hesitation in including a grandchild in the category of a child. It is, however, more cautious to include a son's child, but apparently a daughter's child is not included in this category, although it would be more cautious to include a daughter's child as well. It is also not far from likely to include a wife other than a permanent one, particularly when the period [of her contract] is a long one.

Chapter Two – Laws Concerning Expiations (*Kaffārāt*)

Problem # 1. Emancipatioin of an infidel slave is not absolutely allowed in expiation, and there is condition of his being a Muslim. It is all equal whether the slave is a male or female, a minor or an adult who falls under the title of a Muslim so that one of his/her parents is a Muslim, though caution must not be given up in the expiation for murder by emancipating an adult slave. It is also a condition that the slave must be free from all blemishes that automatically lead to emancipation as blindness, black leprosy (*Judhām*), invalidity resulting in his/her being confined to bed or loss of any part of body (*Tankīl*). There is, however, no objection in other blemishes. So the emancipation of a deaf, dumb one, etc. is allowed. It is also allowed to emancipate an escaped slave even if it is not known to what place he has escaped unless there is no knowledge about his death.

Problem # 2. In all the three acts, namely, emancipation, fasting and feeding (the poor), there is the condition of an intention (*Niyyat*) of the act, seeking closeness [to Allāh] and its being for the sake of expiation, as well as the determination of its type, in case there are several types of it. So if a person owes expiations for *Ẓihār*, oath and breaking a fast, and then a person emancipates a slave, and intends merely to make expiation [without specifying as to which of them he intends to make the expiation], it shall not be sufficient for any of them. If, however, he owes several expiations of a single type, it shall be sufficient to express merely the type, and there is no need of making other specifications. So if a person has broken the fast of the month of Ramaḍān relating to one or two years, and he emancipates a slave for breaking fast, it shall be sufficient, even if he does not specify the day on which he had broken the fast. The same shall be the rule in case of breaking [other] fasts and feeding [the poor].

نوعها لو كانت عليه أنواع متعددة، فلو كانت عليه كفارة ظهار و يمين و إفطار فأعتق عبداً و نوى التكفير لم يجز عن واحد منها، و في المتعدد من نوع واحد يكفي قصد النوع، و لا يحتاج إلى تعيين آخر، فلو أفطر أياماً من شهر رمضان من سنة أو سنين فأعتق عبداً لكفارة الافطار كفى و إن لم يعين اليوم الذي أفطر فيه، و كذلك بالنسبة إلى الصيام و الاطعام، ولو كان عليه كفارة و لا يدري نوعها مع علمه باشتراكها في الخصال مثلاً كفى الا تيان باحداها ناو ياً عما في ذمته، بل لو علم أن عليه إعتاق عبد مثلاً و لا يدري أنه منذور أو عن كفارة كفى إعتاق عبد بقصد ما في ذمته.

مسألة ٣ ـ يتحقق العجز عن العتق الموجب للانتقال إلى غيره في المرتبة بعدم الرقبة أو عدم التمكن من شرائه أو غير ذلك مما هو مذكور في الفقه، و يتحقق العجز عن الصيام الموجب لتعين الاطعام بالمرض المانع منه أو خوف زيادته بل حدوثه إن كان لمنشأ عقلائي، و بكونه شاقاً عليه بما لا يتحمل، و هل يكفي وجود المرض أو خوف حدوثه أو زيادته في الحال ولو مع رجاء البرء و تبدل الأحوال أو يعتبر اليأس؟ و جهان بل قولان لايخلو أولهما من رجحان، نعم لو رجا البرء بعد زمان قصير يشكل الانتقال إلى الاطعام، ولو أخر الاطعام إلى أن برأ من المرض و تمكن من الصوم تعين و لم يجز الاطعام.

مسألة ٤ ـ ليس طرو الحيض و النفاس موجباً للعجز عن الصيام و الانتقال إلى الاطعام، و كذا طرو الاضطرار على السفر الموجب للافطار لعدم انقطاع التتابع بطرو ذلك.

مسألة ٥ ـ المعتبر في العجز و القدرة هو حال الأداء لا حال الوجوب فلو كان حال حدوث موجب الكفارة قادراً على العتق عاجزاً عن الصيام فلم يعتق حتى انعكس صار فرضه الصيام، و سقط عنه وجوب العتق.

مسألة ٦ ـ لو عجز عن العتق في المرتبة فشرع في الصوم ولو ساعة من النهار ثم وجد ما يعتق لم يلزمه العتق، فله إتمام الصيام و يجزي، و في جواز رفع اليد عن

If a person owes an expiation, but is ignorant of its type, though having knowledge of its belonging, for example, to one of the three types, he may make the expiation by expressing intention of its relating to whatever expiation is owed by him. If, however, he knows that he owes the expiation, for example, for emancipating a slave, but does not know whether it relates to a vow (*Nadhr*) or expiation, it shall be sufficient for him to emancipate a slave with the intention of absolving himself of whatever is owed by him.

Problem # 3. The inability to emancipate a slave that leads to shifting it to another type of expiation is confirmed in case of unavailability of a slave, incapability to purchase a slave or any other reason mentioned under Jurisprudence. The inability to keep fast that leads to shifting it to feeding [the poor] is confirmed by a sickness precluding its performance, or fear of its aggravation, rather even fear of falling sick if it is proved by reason, and its being severe for the person in a way that its is beyond his tolerance. Whether [in such case] the present existence of a sickness or the fear of falling sick or that of the aggravation of the sickness is sufficient even if there is hope of his recovery from the sickness or the change in his condition, or it is a condition that there may be no such hope, there are two alternatives, rather opinions in this regard, the former nor being devoid of preference. Of course, if there is hope of his recovery after a short time, there it shall be objectionable to shift it to feeding [the poor]. If the person delays feeding [the poor] until his recovery from the sickness and becoming able keep fast, fasting shall become binding on him, and shifting to feeing [the poor] shall not be permissible.

Problem # 4. The occurrence of menstrual or puerperal blood does not entail inability to keep fast and shifting to feeding [the poor]. Likewise, the urgency for a journey shall also not lead to giving up fasting, as it shall not entail suspension of the uninterrupted sequence of fasting due to the journey.

Problem # 5. The ability of inability [of emancipating a slave] pertains to the time of performing it and not to the time of its becoming obligatory. If at the time of the occurrence of act entailing expiation, the person is capable of emancipating a slave but unable to keep fast, but fails to emancipate a slave until the position is reversed, it shall become obligatory for him to keep fast and the obligation to emancipate a slave shall be suspended.

Problem # 6. If in a sequential expiation, a person is unable to emancipate a slave, and starts keeping fast even for an hour, and then finds something for emancipating a slave, he shall no more be under the obligation to emancipate a slave, he shall be required merely to complete his fast and that will be sufficient for him. There is also justification for him to give up fasting and resort to emancipating a slave; rather, it is preferable.

If something takes place that leads to its resumption, as when something occurs that invalidates its uninterrupted sequence, emancipating a slave shall become binding on him, provided he

الصوم و اختيار العتق وجه، بل الظاهر أنه أفضل، ولو عرض ما يوجب استئنافه بأن عرض في أثنائه ما أبطل التتابع تعين عليه العتق مع بقاء القدرة عليه، و كذا الكلام فيما لو عجز عن الصيام فدخل في الاطعام ثم زال العجز.

مسألة ٧ ـ يجب التتابع في الصيام في جميع الكفارات، و الحكم في بعضها مبني على الاحتياط، فلا يجوز تخلل الافطار و لا صوم آخر بين أيامها و إن كان لكفارة أخرى، من غير فرق بين ما وجب فيه شهران مرتباً على غيره أو مخيراً أو جمعاً، و كذا بين ما وجب فيه شهران أو ثلاثة أيام ككفارة اليمين، و متى أخل بالتتابع وجب الاستئناف، و يتفرع على وجوبه أنه لا يجوز الشروع في الصوم من زمان يعلم بتخلل صوم آخر واجب في زمان معين بين أيامه، فلو شرع في صيام ثلاثة أيام قبل شهر رمضان أو قبل خميس معين مثلاً نذر صومه بيوم أو يومين لم يجز و وجب استئنافه.

مسألة ٨ ـ انما يضرّ بالتتابع ما إذا وقع الافطار في البين باختيار، فلو وقع لعذر كالاكراه أو الاضطرار أو المرض أو الحيض أو النفاس لم يضرّ به، و منه وقوع السفر في الأثناء إن كان ضرورياً دون غيره، و كذا منه ما إذا نسي النية حتى فات وقتها بأن تذكر بعد الزوال، و كذا الحال فيما إذا كان تخلل صوم آخر لا بالاختيار كما إذا نسي فنوى صوماً آخر و لم يتذكر إلا بعد الزوال، و منه ما إذا نذر صوم كل خميس مثلاً ثم وجب عليه صوم شهرين متتابعين، فلا يضر تخلل المنذور، و لا يتعين عليه البدل في المخيرة، و لا ينتقل إلى الاطعام في المرتبة، نعم في صوم ثلاثة أيام يخل تخلله في المفروض، فيلزم الشروع فيها من زمان لم يتخلل المنذور بينها، نعم لو كان المنذور على وجه لا يمكن معه تحصيل التتابع كما إذا نذر الصيام يوماً و يوماً لا، فلا يضر التخلل به.

مسألة ٩ ـ يكفي في تتابع الشهرين في الكفارة مرتبة كانت أو مخيرة صيام شهر و يوم متتابعاً، و يجوز التفريق في البقية ولو اختياراً لا لعذر، فمن كان عليه صيام شهرين متتابعين كفارة يجوز له الشروع فيه قبل شعبان بيوم، و لا يجوز له

is still capable to emancipate a slave.

The same rule shall apply in case a person is incapable to keep fast and so he falls under the obligation to feed [the poor], and then his incapability is removed.

Problem # 7. In all types of expiations, an uninterrupted sequence of fasting is obligatory, but in case of some of them its rule depends on caution. So an interruption is not allowed between the days of breaking of a fast and keeping another fast, even if it were for another expiation, without there being any difference between the cases where fasting for two months is obligatory whether consecutive or optional or collective. So also there is no difference between the cases where fasting for two months is obligatory or it is obligatory where for three days as in case of an oath (*yamīn*). If some interruption takes place, it shall be obligatory to keep fast again. A branch of this obligation is that it is not allowed to start the fast from the time in which one knows that during its days an interruption for another obligatory fast with a definite time shall take place. So if a person starts fasting for three days before the month of Ramaḍān or before the Thursday appointed,suppose, for votive fasting for a day or two, it shall not be allowed and he shall be required to fast again.

Problem # 8. An uninterrupted sequence shall be damaged if breaking a fast takes place in between voluntarily. If, however, it takes place due to some [due] excuse as by coercion, in emergency, or sickness, menstrual or puerperal blood, it shall not thereby be damaged. To the same category belongs going on a journey in between if it were essential but not otherwise. Likewise, to the same category belongs the case if one forgets to express intention until the expiry of its proper time as when he comes to recollect [having forgotten to express intention] after noon. The same shall be the case if the interruption of another fast takes place involuntarily, as when out of forgetfulness he expresses the intention of another fast, and does not come to realise it until after noon.

To the same category belongs the case when one vows to keep fast, for example, every Thursday, and then he is obliged to fast for two consecutive months, in which case the interruption of the votive fast shall not make any damage. In an optional fast, he shall not be obliged to compensate, nor shall it be shifted to feeding [the poor] in case of consecutive fasts. Of course, fasting for three days shall cause interruption in the obligatory fasts. So it is necessary that one must start fasting from a time so that the votive fasts may not interrupt in between.Of course, if the votive fasts are of a nature that an uninterrupted sequence is not possible along with them, as when one vows to keep fast on alternate days, it shall not damage the uninterrupted sequence.

Problem # 9. In case of an expiation [of fasting] for two consecutive months, regardless whether it is consecutive or optional, it is sufficient to fast for one month and a day consecutively, and keep fast with intervals for the rest of the period even voluntarily and without any due excuse. So if a person is obliged to fast for two consecutive months as expiation, he is allowed to start fasting one day before the month of Sha'bān. He may not confine himself to the month of Sha'bān alone;

Rather he may even start fasting thirty one days before the Eid al-Aḍḥā, but not thirty days before it.

Problem # 10. If a person who is obliged to fast for two months starts fasting one the first of a month, it

الاقتصار على شعبان، و كذا يجوز الشروع قبل الأضحى بواحد و ثلاثين يوماً، و لا يجوز قبله بثلاثين.

مسألة ١٠ ـ من وجب عليه صيام شهرين فان شرع فيه من أول الشهر يجزي هلاليان و إن كانا ناقصين، و إن شرع في أثنائه ففيه وجوه بل أقوال، أوجهها تكسير الشهرين و تتميم ما نقص، فلو شرع فيه عاشر شوال يتم بصيام تاسع ذي الحجة من غير فرق بين نقص الشهرين أو تمامهما أو اختلافهما، و الأحوط صيام ستين يوماً، ولو وقع التفريق بين الأيام بتخلل ما لا يضر بالتتابع شرعاً يتعين ذلك و يجب الستين.

مسألة ١١ ـ يتخير في الاطعام الواجب في الكفارات بين إشباع المساكين و التسليم إليهم، و يجوز إشباع بعض و التسليم إلى آخر، و لا يتقدر الاشباع بمقدار، بل المدار أن يأكلوا بمقدار شبعهم قل أو كثر، و أما في التسليم فلابد من مدّ لا أقل، و الأفضل بل الأحوط مدّان، و لابد في كل من النحوين كمال العدد من ستين أو عشرة، فلا يجزي إشباع ثلاثين أو خمسة مرتين أو تسليم كل واحد منهم مدين، و لا يجب الاجتماع لا في التسليم و لا في الاشباع، فلو أطعم ستين مسكيناً في أوقات متفرقة من بلاد مختلفة ولو كان هذا في سنة و ذاك في سنة أخرى لأجزأ و كفى.

مسألة ١٢ ـ الواجب في الاشباع إشباع كل واحد من العدد مرة، و إن كان الأفضل إشباعه في يومه و ليله غداة و عشاءاً.

مسألة ١٣ ـ يجزي في الاشباع كل ما يتعارف التغذي و التقوت به لغالب الناس من المطبوخ و ما يصنع من أنواع الأطعمة، و من الخبز من أيّ جنس كان مما يتعارف تخبيزه من حنطة أو شعير أو ذرة أو دخن و غيرها و إن كان بلا إدام، نعم الأحوط في كفارة اليمين و ما كانت كفارته كفارتها عدم كون الاطعام بل و التسليم أدون مما يطعمون أهليهم، وإن كان الاجزاء بما ذكر فيها أيضاً لا يخلو من قوة، و الأفضل أن يكون مع الادام، و هو كل ما جرت العادة

is sufficient for him to fast for two lunar months, even if they have less than thirty days. If, however, he starts fasting from in between, then there are several alternatives, rather opinions, the most reasonable of them being in favour of breaking the two months into two parts and completing them for what is short of two months. So if he starts fasting from the l0th of Shavvāl, he should complete his fast with the fast on 9th of Dhu al-Ḥijjah without any difference whether the two months have full thirty days each or less, or one having thirty days without the other; though it is more cautious to fast for sixty days. If some interval takes place between the days due to interruption that does not affect the uninterrupted sequence according to the *Sharī'ah*, it should be followed, and it would be obligatory to complete fasting for sixty days.

Problem # 11. In case of obligatory feeding [the poor] as expiations on may opt for feeding the poor to the fill or handing over the food to them. It is also allowed to feed some of them to the fill and handing over the food to others. As regards feeding the poor to the fill, no amount of food is fixed for it; rather the basis is the amount of food eaten by them to their fill whether it is small or big. However, in case the food is handed over to them, it is indispensable that it must be at least equivalent to a *Mudd*, while it is preferable, rather more cautious, for it to be equivalent to two *Mudds*. In both cases, it is indispensable to complete the number of sixty or ten. So it is not sufficient to feed thirty of them to the fill or five twice, or to hand over two *Mudds* to each of them.

It is not compulsory to collect all of them together whether at the time of handing over the food or feeding them to the fill. So if one feeds sixty poor persons belonging to different places on different occasions, even if a group of them is fed in one year and another in another year, it is shall be quite permissible and sufficient.

Problem # 12. In case of feeding [the poor] to the fill, it is obligatory to feed each of the required number to the fill once, though it is preferable to feed them to the fill in a day and night in the morning and evening.

Problem # 13. In case of feeding [the poor] to the fill it is sufficient to feed what is usual food as cooked or what kind of food is prepared by most of the people, including bread made of whatever kind as usual, of what, barley, maize, millet, etc., even if without curry.

Of course, it is more cautious in case of expiation for oath that whatever food is fed or handed over [to the poor] should not be inferior to what one's family is fed with, though in the case mentioned it is also not devoid of force to be in sufficient quantity. It is preferable that it must be accompanied by curry, and that means everything according to the prevalent custom as is eaten along with the bread in solid or liquid form, whether it is vinegar, salt or onions. Whatever is preferable is to be preferred.

In case of the food handed over [to the poor], it must be something that is called food, whether

على أكله مع الخبز جامداً أو مائعاً و إن كان خلاً أو ملحاً أو بصلاً، و كل ما كان أفضل كان أفضل، وفي التسليم بذل ما يسمى طعاماً من نيّ و مطبوخ من الحنطة و الشعير و دقيقهما و خبزهما و الأرز و غير ذلك، و الأحوط الحنطة أو دقيقها، و يجزي التمر و الزبيب تسليماً و إشباعاً.

مسألة ١٤ ـ التسليم إلى المسكين تمليك له، فيملك ما قبضه و يفعل به ماشاء، و لا يتعين عليه صرفه في الأكل.

مسألة ١٥ ـ يتساوى الصغير و الكبير إن كان التكفير بالتسليم، فيعطى الصغير مداً من الطعام كالكبير و إن كان اللازم في الصغير التسليم إلى وليه، و كذلك إن كان بنحو الاشباع إذا اختلط الصغار مع الكبار، فاذا أشبع عائلة أو عائلات مشتملة على كبار و صغار أجزأ مع بلوغهم ستيناً و إن كان الصغار منفردين فاللازم احتساب إثنين بواحد، بل الأحوط احتسابهم كذلك مطلقا، و الظاهر أنه لا يعتبر في إشباعهم إذن الولي.

مسألة ١٦ ـ لا إشكال في جواز إعطاء كل مسكين أزيد من مدّ من كفارات متعددة ولو مع الاختيار من غير فرق بين الاشباع و التسليم، فلو أفطر تمام شهر رمضان جاز له إشباع ستين شخصاً معينين في ثلاثين يوماً، أو تسليم ثلاثين مداً من طعام لكل واحد منهم وإن وجد غيرهم.

مسألة ١٧ ـ لو تعذر العدد في البلد وجب النقل إلى غيره، و إن تعذر انتظر، ولو وجد بعض العدد كرّر على الموجود حتى يستوفي المقدار و يقتصر في التكرار على جميع الموجودين، فلو تمكن من عشرة كرّر عليهم ست مرات، و لا يجوز التكرار على خمسة إثنتا عشرة مرة، و الأحوط عند تعذر العدد الاقتصار على الاشباع دون التسليم، و أن يكون في أيام متعددة.

مسألة ١٨ ـ المراد بالمسكين الذي هو مصرف الكفارة هو الفقير الذي يستحق الزكاة، و هو من لم يملك قوت سنته لا فعلاً و لا قوة، و يشترط فيه الاسلام بل الايمان على الأحوط، و إن كان جواز إعطاء المستضعف من الناس

it is baked or cooked and made of wheat, barley, their flour or bread, and rice, etc. It is more preferable to be wheat or its flour. It is also sufficient to hand over dates or raisins or feed [the poor] to the fill with them.

Problem # 14. Whatever is handed over to the poor belongs to him, so that whatever is delivered to him, he becomes its owner, and may do with it as he likes, and he is not obliged to use it for his own food.

Problem # 15. In case of handing over food as expiation, a minor and adult are equal, so that a minor is to given a *Mudd* of food like an adult, though in case of a minor it is necessary to deliver the food to his/her guardian.

The same is the case if it were in the form of feeding [the poor] to the fill, when the minors and adult are mixed. If a family or families consisting of adults and minors are fed to the fill, it is sufficient if their total number reaches sixty. If, however, there are minors alone, then it is necessary to count two of them as one; rather, it is more cautious to count them in this manner in all circumstances. Evidently in case of feeding the minors to the fill, it is not a condition to obtain the permission of their guardians.

Problem # 16. There is no objection in the permissibility of giving each of the poor more than a *Mudd* in case there are several expiations, even if one has the option not to differentiate between feeding them to the fill or delivering the food to them. If a person fails to keep fast throughout the whole of the month of Ramaḍān, he shall be allowed to feed sixty specific poor persons for thirty days, or hand over thirty *Mudds* of food to each of them, even if there were some poor persons other than them.

Problem # 17. If a person does not find the required number of poor persons in one town, he is allowed to shift to other towns. If he is unable to shift to other towns, he may wait. If he finds a number of the poor persons, he may repeat [feeding or giving them food] until the required number is completed, confining himself to those available.

If he is able to find ten poor persons, he may repeat feeding them six times. But one is not allowed to repeat feeding five months twelve times. In case of unavailability of the required number, it is more cautious to confine oneself to feeding them to the fill without delivering the food to them, and that it should be done on several days.

Problem # 18. By a poor person on whom expiation is to be spent is a poor person who is entitled to receive Zakāt, and that is a person who does not have sustenance for a year indeed and virtually. It is also a condition that he must be a Muslim, rather to be more cautious a Mu'min (or a Shī 'ah), though the permissibility of giving it to any of the deprived class except a *Nāṣib* is not devoid of force, and that he/she must not one whom the giver is obliged to maintain as the parents, children, a permanent wife excluding a temporary one, and also excluding all the near relatives and the maternal relatives including brothers and sisters. It is not a condition for the recipient either to be morally sound or to be one who is

غير الناصب لا يخلو من قوة، و أن لا يكون ممن تجب نفقته على الدافع كالوالدين و الأولاد و الزوجة الدائمة دون المنقطعة و دون سائر الأقارب و الأرحام حتى الاخوة و الأخوات، و لا يشترط فيه العدالة و لا عدم الفسق، نعم لا يعطى المتجاهر بالفسق الذي ألقى جلباب الحياء، و في جواز إعطاء غير الهاشمي إلى الهاشمي قولان، لا يخلو الجواز من رجحان، و إن كان الأحوط الاقتصار على مورد الاضطرار و الاحتياج التام الذي يحلّ معه أخذ الزكاة.

مسألة ١٩ ـ يعتبر في الكسوة في الكفارة أن يكون ما يعد لباساً عرفاً من غير فرق بين الجديد و غيره ما لم يكن منخرقاً أو منسحقاً و بالياً بحيث ينخرق بالاستعمال، فلا يكتفى بالعمامة و القلنسوة و الحزام و الخفّ والجورب، و الأحوط عدم الاكتفاء بثوب واحد خصوصاً بمثل السراو يل أو القميص القصير، فلا يكون أقل من قميص مع سراو يل و إن كان الأقوى جواز الاكتفاء به، و الأحوط أن يكون مما يواري عورته، و يعتبر فيها العدد كالاطعام، فلو كرّر على واحد بأن كساه عشر مرات لم تحسب إلا واحدة، و لا فرق في المكسوّ بين الصغير و الكبير و الذكر و الأنثى، نعم في الاكتفاء بكسوة الصغير في أوائل عمره كابن شهر أو شهرين إشكال فلا يترك الاحتياط، و الظاهر اعتبار كونه مخيطاً فيما كان المتعارف فيه المخيطية دون ما لا يحتاج إلى الخياطة، فلو سلم إليه الثوب غير مخيط في الفرض لم يجز، نعم الظاهر أنه لا بأس بأن يدفع أجرة الخياطة معه ليخيطه و يلبسه، و لا يجزي إعطاء لباس الرجال للنساء و بالعكس، و لا إعطاء لباس الصغير للكبير، و لا فرق في جنسه بين كونه من صوف أو قطن أو كتان أو غيرها، و في الاجتزاء بالحرير المحض للرجال إشكال إلا إذا جاز لهم اللبس لضرورة أو غيرها، ولو تعذر تمام العدد كسا الموجود وانتظر الباقي، و الأحوط التكرار على الموجود، فاذا وجد الباقي كساه.

مسألة ٢٠ ـ لا تجزي القيمة في الكفارة لا في الاطعام و لا في الكسوة بل لابدّ في الاطعام من بذل الطعام إشباعاً أو تمليكاً، و كذا في الكسوة لابد من

not a depraved person [*fāsiq*]. Of course, if a person is openly a depraved person and has thrown away the attire of modesty, he should not be given [the food of expiation]. As regards the question of giving a Hāshimi's [food of expiation] of a non-Hāshimi, there are two opinions, preference to the permissibility not being devoid of force, though it is more cautious to confine to the case of emergency and abject necessity that renders the receipt of Zakāt lawful.

Problem # 19. In case of cladding [the poor] as expiation, it is a condition that it must be something that is regarded as clothes according to the prevalent custom without there being difference in its being new or otherwise as long it is not torn, ragged or worn out to the extent that it may tear into pieces by use. It is not sufficient to be a turban, cap, belt, shoes or socks, and, to be more cautious, it should not be confined to a single piece only like trousers, or a small shirt. It should not be less than trousers along with a shirt, though, according to the stronger opinion, it is sufficient to be so. According to the more cautious opinion, it must be something that may cover one's privy parts. As required in case of feeding [the poor], there is a condition of number [of persons to be clad]. If a person repeats cladding a single person, so that he clads him ten times, it shall be counted as once. There is no difference whether those clad are minors or adult, males or females. Of course, there is objection in sufficiency in cladding a minor in his early age as a child of one or two months, and so caution must not be given up. Evidently there is a condition of the clothes being stitched known as such according to the prevalent custom as may not need stitching. If a person gives an unstitched cloth in an obligatory expiation, it shall not be permissible.

Of course, according to the traditional authority, there is no objection if a person gives tailoring charges along with the cloth so that the recipient may get it stitched and wear it. It is not allowed to give male garments to females and vice versa. Nor is it allowed to give garments of minors to adults. There is no difference in the quality of the garments whether they are made of wool, cotton or flax, etc. There is objection in confining to silken clothes for males, as they are allowed to wear silken clothes only in emergency, etc. If a person is unable to find all the required number of persons, he may provide them to those available, and wait for the rest. It is more cautious to repeat providing clothes to the available persons, and to the rest whenever they are available.

Problem # 20. In case of expiation, it is allowed to pay the price, for the food or the clothes. Rather in case of feeding [the poor], it is indispensable to feed them to the fill or give it in their possession. The same is the case with clothing. It is indispensable to give the garments [to the poor].

Of course, there is no objection in paying the price to the deserving person if he is reliable, and authorise him to purchase for feeding himself or becoming its master, or purchase garments for clothing himself.

Problem # 21. When an optional expiation becomes obligatory upon a person, it is not allowed to make

إعطائها، نعم لا بأس بأن يدفع القيمة إلى المستحق إذا كان ثقة، و يوكّله في أن يشتري بها طعاماً فيأكله أو يتملكه أو كسوة ليلبسها.

مسألة ٢١ ـ إذا وجبت عليه كفارة مخيرة لم يجز أن يكفّر بجنسين بأن يصوم شهراً و يطعم ثلاثين في كفارة شهر رمضان مثلاً، أو يطعم خمسة و يكسو خمسة مثلاً في كفارة اليمين، نعم لا بأس باختلاف أفراد الصنف الواحد منها كما لو أطعم بعض العدد طعاماً خاصاً و بعضه غيره، أو كسا بعضهم ثوباً من جنس و بعضهم من آخر، بل يجوز في الاطعام أن يشبع بعضاً و يسلم إلى بعض كما مرّ.

مسألة ٢٢ ـ لا بدل للعتق في الكفارة مخيرة كانت أو مرتبة أو كفارة الجمع، فيسقط بالتعذر، و أما صيام شهرين متتابعين و الاطعام لو تعذرا ففي كفارة شهر رمضان مع تعذر جميع الخصال يتصدق بما يطيق، و مع عدم التمكن يستغفر الله، و يكفي مرة، و الأحوط في هذه الصورة التكفير ،إن تمكن بعد ذلك،و في غيرها مع تعذرهاصيام ثمانية عشر يوماً ،على الأقوى في الظهار، و على الأحوط في غيره،والأحوط التتابع فيها، و إن عجز عن ذلك أيضاً صام ما استطاع أو تصدق بما وجد على الأحوط في شقي التخيير، و مع العجز عنها بالمرة استغفر الله تعالى ولو مرة.

مسألة ٢٣ ـ الظاهر أن وجوب الكفارات موسع، فلا تجب المبادرة إليها، و يجوز التأخير ما لم يؤد إلى حدّ التهاون.

مسألة ٢٤ ـ يجوز التوكيل في إخراج الكفارات المالية و أدائها، و يتولى الوكيل النية إن كان وكيلاً في إخراجها، و إن كان وكيلاً في الإيصال إلى الفقير ينوي الموكل حين دفع الوكيل إلى الفقير، و يكفي أن يكون من نيته أن ما يدفع وكيله إلى الفقير كفارة، و لا يلزم العلم بوقت الأداء تفصيلاً، و أما الكفارات البدنية فلا يجزي فيها التوكيل، و لا تجوز فيها النيابة على الأقوى إلا عن الميت.

مسألة ٢٥ ـ الكفارات المالية بحكم الديون، فلو مات من وجبت عليه تخرج

expiation of two kinds, as, for example, in case of expiation for the month of Ramaḍān he must keep fast for a month and feed thirty [poor persons], or in case of expiation for breach of oath, he must feed or clad five [poor persons]. Of course, there is no objection in differentiating between the individuals of a single category, as when he feeds a number of them a special food and others some other food, or provides clothes of one quality to some of them and of another quality to others. Rather it is also permissible if he feeds some of them to the fill and gives food to others, as mentioned earlier.

Problem # 22. In case of an optional expiation emancipation [of a slave] is indispensable, no matter whether it is a sequential expiation or a collective one. It is dropped in case of the person's incapability. However, as regards the consecutive fasting for two months or feeding [the poor], in case he is not capable to do both, then in case of expiation for the month of Ramaḍān, in case of incapability to make any of the types of expiations, he may give in charity whatever he is able to do. In case of his incapability even to do so, he may ask forgiveness of Allāh, and it is sufficient to do so once. In such case, if subsequently he becomes capable to expiate, it is more cautious for him to make expiation. In other cases, in case of his incapability, he must keep fast for eight days, according to the stronger opinion, in case of *Ẓihār*, and according to the more cautious opinion, even in other cases. According to the more cautious opinion he must fast consecutively in such cases. In case of his incapability to do so, he must keep fast for as many days as he can, or, according to the more cautious opinion, he must give in charity whatever he is able to do in both the categories of optional expiation. In case of his total incapability, he must ask forgiveness of Allāh, even for once.

Problem # 23. According to the traditional authority, the obligation of expiations allows sufficient time for its fulfilment. So it is not obligatory to expedite in their case, and there is permission of delay as long it does not amount to negligence.

Problem # 24. It is allowed to authorise another person for deduction and payment of financial expiations. Such an agent shall express intention if he is authorised for the deduction. In case a person is authorized to carry it to the poor, he shall express intention at the time of its delivery to the poor. It is sufficient at the time of expressing such intention that whatever it is being paid to the poor is by way of expiation. It is not necessary to have detailed knowledge at the time of delivery. As regards the physical expiations, it is not allowed to authorise another to fulfil them. According to the stronger opinion, it is not allowed to authorise another make such expiations, except on behalf of the dead.

Problem # 25. Financial expiations are to be treated at par with debts. If a person who owes them dies, their amount shall be deducted from his original property.

As regards the physical expiations, neither their payment is obligatory on the heirs of the deceased, nor are they to be deducted from the inheritance unless the deceased has left a will in their

من أصل المال، و أما البدنية فلا يجب على الورثة أداؤها و لا إخراجها من التركة ما لم يوص بها الميت، فتخرج من ثلثه، نعم في وجوبها على الولي و هو الولد الاكبر احتمال قوي فيما إذا تعين على الميت الصيام، و أما لو تعين عليه غيره بأن كانت مرتبة و تعين عليه الاطعام فلا يجب على الولي، ولو كانت مخيرة و كان متمكناً من الصيام و الاطعام فلو أمكن الاخراج من التركة تخرج منها، و إلا فالأحوط على الولي الصيام لو تلفت التركة أو أبي الورثة عن الاطعام.

regard, in which case their amount shall be deducted from the third of his [original] property.

Of course, as regards their payment being obligatory on the *Walī*, who is the eldest son of the deceased, there is a strong likelihood in its favour, in case the deceased owes keeping fasts.

In case, however, the deceased owes some other expiations, as when there are some sequential expiations owed by him entailing the obligation for feeding [the poor], the *Walī* of the deceased shall be under no obligation in respect of them.

In case the expiations owed by the deceased were of optional category, and he was capable of keeping fast and feeding [the poor], then if it were possible to deduct the amount in respect of them from the inheritance, it shall be deducted from it; otherwise, in case of the loss of the inheritance or refusal of the heirs to feed [the poor], according to the more cautious opinion, it shall be obligatory on the *Walī* of the deceased to keep fast.

كتاب الصيد والذباحة

القول في الصيد

كما يذكىّ الحيوان و يحل لحم ما حل أكله بالذبح الواقع على النحو المعتبر شرعاً يذكىّ أيضاً بالصيد على النحو المعتبر، و هو إما بالحيوان أو بغيره، و بعبارة أخرى الآلة التي يصاد بها إما حيوانية أو جمادية، و يتم الكلام في القسمين في ضمن مسائل.

مسألة ١ ـ لا يحل من صيد الحيوان و مقتوله إلا ما كان بالكلب المعلم سواء كان سلوقياً أو غيره، و سواء كان أسود أو غيره، فلا يحلّ صيد غيره من جوارح السباع كالفهد و النمر و غيرهما و جوارح الطير كالبازي و العقاب و الباشق و غيرها و إن كانت معلمة، فما يأخذه الكلب المعلم و يقتله بعقره و جرحه مذكى حلال أكله من غير ذبح، فيكون عضه و جرحه على أيّ موضع من الحيوان بمنزلة ذبحه.

مسألة ٢ ـ يعتبر في حلية صيد الكلب أن يكون معلماً للاصطياد، و علامة كونه بتلك الصفة أن يكون من عادته مع عدم المانع أن يسترسل ويهيج إلى الصيد لو أرسله صاحبه وأغراه به، و أن ينزجر و يقف عن الذهاب و الهياج إذا زجره، نعم لا يضر إذا لم ينزجر حين رؤية الصيد و قربة منه، و الأحوط أن يكون من عادته التي لا تتخلّف إلا نادراً أن يمسك الصيد و لا يأكل منه شيئاً حتى يصل

SECTION THIRTY-THREE

HUNTING (*ṢAYD*) & SLAUGHTER (*DHABĀḤAH*)

Chapter One - Hunting (*Ṣayd*)

As an animal becomes clean and its meat is allowed for eating by slaughtering in the manner prescribed by the *Sharī'ah*, in the same way it becomes clean [and its meat allowed to be eaten] by hunting in the prescribed manner, that is, by means of an animal or otherwise, in other words, by means of a thing used in hunting, whether in the form of an animal or anything made of a metal.

The discussion on it shall be completed in two parts during which its relevant problems shall be discussed.

Problem # 1. A prey hunted or killed through an animal is not allowed to be eaten except when it is hunted through a trained dog, irrespective of the dog being a greyhound or otherwise, of black or some other colour. It is not allowed for eating if it is hunted through a beast as a panther or a leopard, etc., or through any bird like a falcon, eagle or a hawk, etc, even if they are trained. So any animal caught by a trained dog and killed or wounded by its teeth is clean and [its meat] is allowed for eating without slaughtering it, and its being cut or wounded from any part of its body amounts to slaughtering it.

Problem # 2. It is a condition for the permission of eating an animal hunted by a dog that the dog must be trained for hunting, and its sign is that it must possess the quality of having the habit of running and chasing the prey when it is asked by its master to run after and chase a prey in case there is no hurdle in its way or stop running and chasing the prey when it is ordered by its master to do so. Of course, there shall be no harm even if the dog does not stop on seeing the prey and coming close to it, though, according to the more cautious opinion, it must be the habit of the dog but rarely to catch the prey and not to eat anything of the prey until the arrival of its master.

Problem # 3. The permissibility of [eating the meat of] the prey hunted by a dog requires the following

صاحبه.

مسألة ٣ـ يشترط في حلية صيد الكلب المعلم أمور:

الأول ـ أن يكون ذلك بارساله للاصطياد، فلو استرسل بنفسه من دون إرسال لم يحل مقتوله و إن أغراه صاحبه بعده حتى فيما أثر إغراؤه فيه بأن زاد في عدوه بسببه على الأحوط، و كذا الحال لو أرسله لا للاصطياد بل لأمر آخر من دفع عدو أو طرد سبع أو غير ذلك فصادف غزالاً فصاده، والمعتبر قصد الجنس لا الشخص، فلو أرسله إلى صيد غزال فصادف غزالاً آخر فأخذه و قتله كفى في حله، و كذا لو أرسله إلى صيد فصاده مع غيره حلا معاً.

الثاني ـ أن يكون المرسل مسلماً أو بحكمه كالصبي الملحق به بشرط كونه مميزاً، فلو أرسله كافر بجميع أنواعه أو من كان بحكمه كالنواصب لعنهم الله لم يحل أكل ما قتله.

الثالث ـ أن يسمي بأن يذكر اسم الله عند إرساله، فلو تركه عمداً لم يحل مقتوله، و لا يضر لو كان نسياناً، و الأحوط أن تكون التسمية عند الارسال، فلا يكتفى بها قبل الاصابة.

الرابع ـ أن يكون موت الحيوان مستنداً إلى جرحه و عقره، فلو كان بسبب آخر كصدمه أو خنقه أو إتعابه أو ذهاب مرارته من الخوف أو إلقائه من شاهق أو غير ذلك لم يحل.

الخامس ـ عدم إدراك صاحب الكلب الصيد حياً مع تمكنه من تذكيته بأن أدركه ميتاً أو أدركه حياً لكن لم يسع الزمان لذبحه، و بالجملة إذا أرسل كلبه إلى الصيد فان لحق به بعد ما أخذه و عقره و صار غير ممتنع فوجده ميتاً كان ذكياً و حل أكله، و كذا إن وجده حياً و لم يتسع الزمان لذبحه فتركه حتى مات، و أما ان اتسع لذبحه لا يحلّ إلا بالذبح، فلو تركه حتى مات كان ميتة، و أدنى ما يدرك ذكاته أن يجده تطرف عينيه أو تركض رجله أو يحرك ذنبه أو يده، فان وجده كذلك واتسع الزمان لذبحه لم يحل أكله إلا بالذبح، و كذلك

conditions.

Firstly, the dog must have been sent for hunting. So if the dog goes by itself without being sent, [the meat of the animal] killed by it shall not be permissible for eating, even its master should have incited it later, and, according to the more cautious opinion, even in case the incitement has been effective in it, as when it has caused acceleration in the speed of its running. The same shall be the case if the master has not sent the dog for hunting, but for some thing else, as defending him against an enemy or driving away a beast, etc., and the dog happens to come across a deer which he hunts. In such case, what is required is the prey intended and not the person. So if the master sends the dog for hunting a deer, and the dog happens to find another deer that he catches and kills, it shall be sufficient for being allowed [for eating]. The same shall be the case if the master sends the dog to hunt a prey, and the dog hunts the prey along with another animal, [the meat of] both the preys shall be allowed [for eating].

Secondly, the person sending the dog [to hunt a prey] must be a Muslim, or one treated as such, as child under the custody of a Muslim, provided that the child is discreet. So if the dog is sent [for hunting a prey] by an infidel of any category, or one who is treated as such, as one of the *Nawāṣib*, Allāh's curse be upon them, [the meat of] the animal killed by the dog shall not be allowed [for eating by a Muslim].

Thirdly, at the time of sending the dog [for hunting a prey], the person must pronounce any of Allāh's attributes. If he gives up doing so deliberately, [the meat of] the animal killed by the dog shall not be allowed [for eating by a Muslim]. According to the more cautious opinion, the pronouncement of Allāh's attribute must take place at the time of sending the dog [for hunting the prey]. So it shall not be sufficient to do so before the dog pounces on the prey.

Fourthly, the death of the animal must be as a result of the dog's wounding or cutting it. If it were due to something else, as knocking, strangulating, tiring it or its bursting with fear or its falling from a high altitude, etc., [the meat of] such prey shall not be allowed [for eating by a Muslim].

Fifthly, failure of the master to reach the dog's prey while it is still alive despite his ability to clean it , as when he reaches it after its death, or when he reaches it while it is still alive, but there is no sufficient time for slaughtering it. In short, if a person sends his dog for hunting, then if he reaches it after the dog has caught and cut and it and it becomes inaccessible, and so he finds it dead, it shall be clean and [its meat shall be] allowed for eating. The same shall be the case if the master finds it alive, but there is no sufficient time for slaughtering it, and he leaves it until it is dead. If there is sufficient time for slaughtering it, [the meat of] the prey shall not be allowed for eating except after slaughtering it. If he leaves it until he dies, it shall be treat as a dead animal. The least thing for treating it as clean is that its eyes must be rolling, or its legs must be trembling or it must be wagging its tail or moving its fore-legs. So if the master finds the prey in such condition and there is ample time for its slaughter, [the meat of] the animal shall not be allowed for eating except after slaughtering it. The same shall be the case if the master finds the animal after the dog has wounded it, but it is not in his control, and so he makes it run after it until it stops. Then if the animal remains alive until there is sufficient time for slaughtering it, [the meat of] the animal shall not be allowed for eating except by slaughtering it. If there is no sufficient time

الحال لو وجده بعد عقر الكلب عليه ممتنعاً فجعل. يعدو خلفه فوقف، فان بقي من حياته زماناً يتسع لذبحه لم يحل إلا به، و ان لم يتسع حل بدونه، و يلحق بعدم اتساعه ما إذا وسع و لكن كان ترك التذكية لا بتقصير منه، كما اذا اشتغل بأخذ الآلة و سل السكين مع المسارعة العرفية و كون الآلات على النحو المتعارف فلو كان السكين في غمد ضيق غير متعارف فلم يدرك الذكاة لأجل سله منه لم يحل، و كذا لو كان لأجل لصوقه به بدم و نحوه، و من عدم التقصير ما إذا امتنع الصيد من التمكين بما فيه من بقية قوة و نحو ذلك فمات قبل أن يمكنه الذبح، نعم لا يلحق به فقد الآلة على الأحوط لو لم يكن أقوى فلو وجده حياً و اتسع الزمان لذبحه إلا أنه لم يكن عنده السكين فلم يذبحه لذلك حتى مات لم يحل أكله.

مسألة ٤ ـ هل يجب على من أرسل الكلب المسارعة و المبادرة الى الصيد من حين الارسال أو من حين ما رآه قد أصاب الصيد و ان كان بعد امتناعه أو من حين ما أوقفه و صار غير ممتنع أو لا تجب أصلاً؟ الظاهر وجوبها من حين الايقاف، فاذا أشعر به يجب عليه المسارعة العرفية حتى أنه لو أدركه حياً ذبحه، فلو لم يتسارع ثم وجده ميتاً لم يحل أكله، و أما قبل ذلك فالظاهر عدم وجوبها و إن كان الاحتياط لا ينبغي تركه، هذا إذا احتمل ترتب أثر على المسارعة و اللحوق بالصيد بأن احتمل أنه يدركه حياً و يقدر على ذبحه من جهة اتساع الزمان و وجود الآلة، و أما مع عدم احتماله ولو من جهة عدم ما يذبح به فلا إشكال في عدم وجوبها، فلو خلاه حينئذ على حاله إلى أن قتله الكلب و أزهق روحه بعقره حل أكله، نعم لو توقف إحراز كون موته بسبب جرح الكلب لا بسبب آخر على التسارع إليه و تعرف حاله لزم لأجل ذلك.

مسألة ٥ ـ لا يعتبر في حلية الصيد وحدة المرسل و لا وحدة الكلب فلو أرسل جماعة كلباً واحداً أو أرسل واحد أو جماعة كلاباً متعددة فقتلت صيداً حل أكله، نعم يعتبر في المتعدد صائداً و آلة أن يكون الجميع واجداً للأمور المعتبرة

for slaughtering it, [the meat of] the animal shall be allowed for eating even without slaughtering it. The time shall be treated as insufficient when it is sufficient but giving up cleaning of the animal has not been due to the master's mistake, as when he expedites getting hold of a knife with the usual sped, and the knife for slaughtering would also be of the usual quality, but the knife would be in an unusual cover, and so he fails to clean the animal due to failure in drawing the knife out of the cover, [the meat of] the animal shall not be allowed for eating [for him]. The same shall be the case if the knife sticks to the cover due to the blood, or the like, [and he fails to slaughter the animal before it dies]. The case when it is treated as one without his mistake is when the animal does not surrender due to the strength left in it, or the like, and it dies before it is slaughtered. Of course, according to the more cautious, though not stronger opinion, the case of unavailability of a knife shall not be treated as one without his mistake, as when he finds the animal when it is still alive, and there is sufficient time for slaughtering it, but he has no knife, and therefore he does not slaughter the animal until it dies, he shall not be allowed to eat [the meat of] the animal.

Problem # 4. Whether it is obligatory on the person who sends the dog [for hunting a prey] to make haste to reach the prey from the time he sends the dog or from the time he notices that the dog has reached the prey though it has not brought it under its control, or from the time it has stopped the prey and it has ceased resistance, or it is not obligatory on him at all, apparently it is obligatory on him from the time the dog has stopped the animal. So when he realises that the dog has stopped the prey, it shall be obligatory on him to make the usual haste so that he may reach it while it is still alive and he may slaughter it. If he fails to make haste, and finds it dead, he shall not be allowed to eat [the meat of] the animal. But before that apparently it shall not obligatory on him, even if he should not give up caution. This is when there is likelihood of his making haste shall be effective in reaching the animal with the possibility of finding the animal alive and enabling him to slaughter it due to sufficiency of time and the availability of a knife. If, however, there is no such likelihood, even if due to the unavailability of a knife, there is no objection in his haste not being obligatory on him. If he leaves the prey in such condition, until the dog kills the animal and its soul leaves its body due to dog's wounding it, he shall be allowed to eat [the meat of [the prey]. If, however, attaining the knowledge about whether the animal has died due to dog's wounding it or due to some other cause depends on making haste and getting to know its actual condition, he shall be bound to make haste for this reason.

Problem # 5. It is neither a condition for the permissibility of eating the meat of a prey that there must be a single person sending the dog [for hunting the prey] nor is it a condition that there must be a single dog [sent for hunting]. So if a group of persons sends a single dog or a single person or a group sends several dogs, and they kill a prey, they shall be allowed to eat [the meat of] the prey. Of course, if there are several hunters and dogs, it shall be a condition that they must all qualify for the conditions imposed by *Shari'ah* for them If there are two persons sending the dog or dogs [for hunting the prey], and one of them is an infidel [and the other a Muslim], or one of them fails to pronounce Allāh's attribute [at the

شرعاً، فلو كان المرسل إثنين أحدهما كافر أو لم يسم أحدهما أو أرسل كلبان أحدهما معلم و الآخر غير معلم فقتلاه لم يحل.

مسألة ٦ ـ لا يؤكل من الصيد المقتول بالآلة الجمادية إلا ما قتله السيف أو السكين أو الخنجر و نحوها من الأسلحة التي تقطع بحدّها أو الرمح و السهم و النشاب مما يشاك بحده حتى العصا التي في طرفها حديدة محددة، من غير فرق بين ما كان فيه نصل كالسهم الذي يركب عليه الريش أو صنع قاطعاً أو شائكاً بنفسه، بل لا يبعد عدم اعتبار كونه من الحديد، فيكفي بعد كونه سلاحاً قاطعاً أو شائكاً كونه من أيّ فلزّ كان حتى الصفر و الذهب و الفضة، و الأحوط اعتباره، و يعتبر كونه مستعملاً سلاحاً في العادة على الأحوط، فلا يشمل المخيط و الشوك و السفود و نحوها، و الظاهر أنه لا يعتبر الخرق و الجرح في الآلة المذكورة أعني ذات الحديد المحّددة، فلو رمى الصيد بسهم أو طعنه برمح فقتله بالرمح والطعن من دون أن يكون فيه أثر السهم و الرمح حل أكله، و يلحق بالآلة الحديدية المعراض الذي هو كما قيل خشبة لا نصل فيها إلا أنها محددة الطرفين ثقيلة الوسط أو السهم الحادّ الرأس الذي لا نصل فيه أو سهم بلا ريش غليظ الوسط يصيب بعرضه دون حده، و كيف كان انما يحل مقتول هذه الآلة لو قتلت الصيد بخرقها إياه و شوكها فيه ولو يسيراً، فلو قتله بثقلها من دون خرق لم يحل، و الأحوط عدم التجاوز عن المعراض إلى غيره من المحددة غير الحديد.

مسألة ٧ ـ كل آلة جمادية لم تكن ذات حديدة محددة و لا محددة غير الحديدية قتلت بخرقها من المثقلات كالحجارة و المقمعة و العمود و البندقة لا يحل مقتولها كالمقتول بالحبائل و الشبكة والشرك و نحوها، نعم لا بأس بالاصطياد بها، و كذا بالحيوان غير الكلب كالفهد و النمر و البازي و غيرها بمعنى جعل الحيوان الممتنع غير ممتنع بها، ولكنه لا يحل ما يصطاد بها إلا إذا أدركه و ذكاه.

مسألة ٨ ـ لا يبعد حلية ما قتل بالآلة المعروفة المسماة بالبندقية مع اجتماع الشرائط بشرط أن تكون البندقة محددة نافذة بحدته على الأحوط، فيجتنب مما

time of sending the dog or dogs for hunting, while the other one does so], or the person [or persons] send two dogs [for hunting the prey], one of them being a trained dog while the other being otherwise, and both of them kill the prey. [the meat of] the prey shall not be allowed [to be eaten by a Muslim].

Problem # 6. A prey that is killed through a metallic implement shall not be eaten except when it is killed by any of the following implements, namely, a sword, a knife, a dagger or the like from among the weapons e used for cutting, or a lance, arrow or an implement used by an arrow maker including a rod having pointed iron fixed on its end, without there being any difference between one having a head like an arrow on which is fixed a feather or which is itself made for the purpose of cutting or perforation, though its being made of iron is not far from being a condition, and it is sufficient if it is an cutting or perforating weapon made of whatever metal including even brass, gold or silver, though, according to the more cautious opinion, it is a condition [to be made of iron], and according to the more cautious opinion, it is a condition that it must be usually used as a weapon. So it does not include a needle, a pin, a skewer, or the like. Apparently piercing and wounding with the said implements made of pointed iron is not a condition. If a person throws an arrow on the prey or pierces a lance and the prey is killed by the lance or arrow, without there being any sign of the arrow or lance, [the meat] of the prey shall be allowed [for eating by a Muslim]. To an iron implement is added a *Mi'rāḍ* that is, as described, a wood without an arrow-head except that it is pointed from both ends, heavy in the middle, or an arrow whose end is pointed but it has no head, or an arrow without a feather, thick in the middle, striking the prey from its breadth but not from its head. Anyhow a prey killed by a *Mi'rāḍ* shall be permitted for eating [by a Muslim] when the prey is killed with its body cutting into pieces or perforated even if slightly. If it is killed by its weight, without being cut into pieces, it shall not be allowed [for eating by a Muslim]. According to the more cautious opinion, one should not go beyond the *Mi'rāḍ* to include other pointed things not made of iron.

Problem # 7. An animal killed by an implement made or a metal or stone without having pointed iron or one being pointed without having been made of iron, when it is killed by any of the heavy objects like a stone, iron hook for goading an elephant, a pillar or pole, or a gun is not allowed for eating [by a Muslim], as a prey killed by ropes, nets, or traps or the like. Of course, there is no objection in hunting with their help. The same is the case if the prey is hunted with the help of an animal other than a dog as a panther, leopard or a hawk, etc. by controlling an out of control animal with their help, but an animal hunted with their help is not allowed for eating [by a Muslim] except when the person reaches the prey and cleans [or slaughters] it.

Problem # 8. It is not far from being allowed for eating if a prey is killed by the well-known weapon called a gun provided that all other conditions [of *Sharī'ah*] are fulfilled,according to the more cautious opinion, on the condition that the bullet must be pointed and for being pointed must pierce the body of the prey. So one must avoid a prey that is killed by a gun of any other type, if the body of the prey has been wounded and torn into pieces by its force, as the prey killed by a bullet we have mentioned to be forbidden for eating [by a Muslim] under the previous Problem is other than this bullet that pierces into the body of the prey due to its speed and tears it into pieces.

قتل بالبندق الذي ليس كذلك و إن جرح و خرق بقوته، و البندقة التي قلنا في المسألة السابقة بحرمة مقتولها غير هذه النافذة الخارقة بحدتها.

مسألة ٩ ـ لا يعتبر في حلية الصيد بالآلة الجمادية وحدة الصائد و لا وحدة الآلة، فلو رمى شخص بالسهم و طعن آخر بالرمح و سمّيا معاً فقتلا صيداً حل إذا اجتمع الشرائط فيهما، بل إذا أرسل أحد كلبه إلى صيد و رماه آخر بسهم فقتل بهما حل.

مسألة ١٠ ـ يشترط في الصيد بالآلة الجمادية جميع ما اشترط في الصيد بالآلة الحيوانية، فيشترط كون الصائد مسلماً و التسمية عند استعمال الآلة و أن يكون استعمالها للاصطياد، فلو رمى إلى هدف أو إلى عدوّ أو إلى خنزير فأصاب غزالاً فقتله لم يحل و إن سمّى عند الرمي لغرض من الأغراض، و كذا لو أفلت من يده فأصابه فقتله، و أن لا يدركه حياً زماناً اتّسع للذبح، فلو أدركه كذلك لم يحل إلا بالذبح، و الكلام في وجوب المسارعة و عدمه كما مرّ، و أن يستقل الآلة المحللة في قتل الصيد، فلو شاركها فيه غيرها لم يحل ، فلو سقط بعد إصابة السهم من الجبل أو وقع في الماء و استند موته إليهما بل و إن لم يعلم استقلال السهم في إماتته لم يحل، و كذا لو رماه شخصان فقتلاه و فقدت الشرائط في أحدهما.

مسألة ١١ ـ لا يشترط في إباحة الصيد إباحة الآلة، فيحل الصيد بالكلب أو السهم المغصوبين و إن فعل حراماً، و عليه الأجرة، و يملكه الصائد دون صاحب الآلة.

مسألة ١٢ ـ الحيوان الذي يحل مقتوله بالكلب و الآلة مع اجتماع الشرائط كل حيوان ممتنع مستوحش من طير أو غيره، سواء كان كذلك بالأصل كالحمام والظبي و البقر الوحشي أو كان أنسياً فتوحش أو استعصى كالبقر المستعصي و البعير كذلك، و كذلك الصائل من البهائم كالجاموس الصائل و نحوه، و بالجملة كل ما لا يجيء تحت اليد و لا يقدر عليه غالباً إلا بالعلاج، فلا تقع التذكية

Problem # 9. It is not a condition in the permissibility of [the meat of] a prey killed by an implement of metal or stone that the hunter must be a single person or there must be a single implement. So if one person throws an arrow and the other attacks with a spear, and both pronounce Allāh's attribute, and both kill a prey, [the meat of] the prey shall be allowed for eating [by both of them] if both of them fulfil the required conditions. Rather even if one of them sends his dog for hunting the prey and another throws an arrow on the prey, as a result of the acts of both the prey is killed, [the meat of] the prey shall be allowed for eating [by both of them].

Problem # 10. All the conditions required in a prey killed by the help of an animal are also required in the prey killed by an implement of iron or stone. So it is a condition that the hunter must be a Muslim, and he must pronounce Allāh's attribute at the time of using the hunting implement, and that its use must be intended for hunting. So if the hunter throws the implement on some other target, an enemy or a pig, and it strikes against a deer and kills it, [the meat of]the deer shall not be allowed for eating [by the hunter], even if he has pronounced Allāh's attribute for any purpose. Likewise, if the implement slips from the hunter's hand and strikes against the prey and kills it, [the same shall be the case]. [It is also a condition] that the hunter must reach the prey while it is alive and there is ample time for slaughtering it. If he reaches the in such conditions, [the meat of] the prey shall not be allowed for eating [by the hunter] except by slaughtering it. As regards the condition that the hunter must make haste to reach the prey, its case shall be same as already mentioned. {it is also a condition] that there must be a single slaughtering implement. So if another implement is also used for slaughtering the prey, [the mat of] the prey shall not be allowed for eating [by the hunter]. If the prey drops from the mountain after being struck by [the hunter's] arrow, or falls into the water, and resulting in its death, rather, even if it is not known that its death had been due to being struck by the arrow, [the meat of] the prey shall not be allowed for eating [by the hunter]. The case shall be the same if two persons attack the prey, killing it, and one of them does not fulfil the required conditions.

Problem # 11. It is not a condition in the lawfulness [of the meat] of the prey that the [hunting] implement must also be lawful. [The meat of] the prey shall be lawful even if it is killed by a usurped dog or arrow, even if the person shall be considered to have committed an unlawful act, and he shall owe a compensation [payable to the master of the dog or arrow], though the prey shall belong to the hunter and not to the master of [the dog or] the implement.

Problem # 12. An animal killed by a dog or an implement fulfilling the required conditions must be a wild animal that is out of control including a bird, etc., regardless whether it is such originally as a wild pigeon, deer or cow, or it may be pet, but later has turned wild or recalcitrant, as a recalcitrant cow or camel. The same is the case with an assaulting animal, as an assaulting buffalo, or the like. In short, every animal that has not been brought under control, and cannot be controlled except by employing a device. So a pet and docile animal cannot be cleaned [or slaughtered] like a prey, irrespective of its being domesticated originally as a fowl, a sheep, a camel or a cow, or domesticated temporarily as a deer or a bird. The same is the case with a wild offspring before it is able to run and the young of a bird before it is ready to fly. If a person attacks a bid and its young that is not yet able to fly, killing both of

الصيدية على الحيوان الأهلي المستأنس سواء كان استئناسه أصلياً كالدجاج و الشاة و البعير و البقر أو عارضياً كالظبي و الطير المستأنسين، و كذا ولد الوحش قبل أن يقدر على العدو و فرخ الطير قبل نهوضه للطيران، فلو رمى طائراً و فرخه الذي لم ينهض فقتلهما حل الطائر دون الفرخ.

مسألة ١٣ ـ الظاهر أنه كما تقع التذكية الصيدية على الحيوان المأكول اللحم فيحلّ بها أكله و يطهر جلده تقع على غير مأكول اللحم القابل للتذكية أيضاً. فيطهر بها جلده و يجوز الانتفاع به، هذا إذا كانت بالآلة الجمادية و أما الحيوانية ففيها تأمل و إشكال.

مسألة ١٤ ـ لو قطعت الآلة قطعة من الحيوان فان كانت الآلة غير محللة كالشبكة و الحبالة مثلاً يحرم الجزء الذي ليس فيه الرأس و محال التذكية، و كذلك الجزء الآخر إذا زالت عنه الحياة المستقرة على الأحوط بأن تكون حركته حركة المذبوح، و إن بقيت حياته المستقرة يحل بالتذكية و إن كانت الآلة محللة كالسيف في الصيد مع اجتماع الشرائط فان زالت الحياة المستقرة عن الجزئين بهذا القطع حلا معاً، و إن بقيت الحياة المستقرة حرم الجزء الذي ليس فيه الرأس و محال التذكية و يكون ميتة، سواء اتسع الزمان للتذكية أم لا، و أما الجزء الآخر فحلال مع عدم اتساع الزمان للتذكية ولو اتسع لها لا يحل إلا بالذبح.

مسألة ١٥ ـ يملك الحيوان الوحشي سواء كان من الطيور أو غيره بأحد أمور ثلاثة: أحدها ـ أخذه حقيقة بأن يأخذ رجله أو قرنه أو جناحه أو شده بحبل و نحوه بشرط أن يكون بقصد الاصطياد و التملك ، و أما مع عدم القصد ففيه إشكال، كما أنه مع قصد الخلاف لا يملك ، ثانيها ـ وقوعه في آلة معتادة للاصطياد بها كالحبالة و الشرك و الشبكة و نحوها إذا نصبهالذلك، ثالثها ـ أن يصيره غير ممتنع بآلة كما لو رماه فجرحه جراحة منعته عن العدو أو كسر جناحه فمنعه عن الطيران، سواء كانت الآلة من الآلات المحللة للصيد كالسهم و

them, the bid shall be lawful [for eating] but not the young.

Problem # 13. Apparently as when an animal whose meat is lawful for eating slaughtered, its meat becomes lawful and its hide is also clean, the same takes place with an animal whose meat is unlawful for eating, it can also be cleaned as a result of which its hide also becomes clean, and it can brought under use.

This is the case when it is killed with the help of an instrument made of iron or stone, but if it is killed with the help of an animal, there shall be hesitation and objection [in its hide being clean for use].

Problem # 14. If an instrument cuts a piece of an animal, the instrument being unlawful, as, for example, a net or rope, the piece without a head shall be unlawful and it cannot be cleaned.

According to the more cautious opinion, the same shall be the case with the other part [of the animal] when it has turned lifeless, and it has moved like a slaughtered animal. If, however, there is still live in it, it can be lawfully cleaned.

If the instrument used in hunting were lawful as a sword fulfilling all the required conditions, then if both the parts of the animal have become lifeless as a result of cutting by the lawful instrument, both of them of them shall be lawful [for eating].

If, however, if it is alive, its part having no head shall be unlawful and it cannot be cleaned and shall be treated as dead, irrespective of there being ample time for cleaning it or not. As regards the other part of the body, it shall be lawful provided there is ample time for cleaning it, and if there is ample time, it shall not be lawful except by slaughtering.

Problem # 15. A wild animal belongs to the hunter, whether it is a bird or otherwise, on one of the following conditions.

Firstly, the hunter must actually catch it, as holding it by its feet, horns or wings, or fastening it with a rope, or the like, provided that it has been with the intention of hunting and possessing it. In case otherwise, there shall be objection, as when it is with some other intention, it shall not belong to him.

Secondly, it should take place with the help of the usual instrument for hunting, as a rope, trap, net, or the like, when the hunter lays it for that purpose.
Thirdly, the prey must become under control with the help of the instrument, as when it is attacked by the instrument, wounding it in a way that it becomes unable to run, or breaking its wings so that it become unable to fly, irrespective of the instrument being meant for killing the prey as an arrow or a

الكلب المعلم أو من غيرها كالحجارة و الخشب و الفهد و الباز و الشاهين و غيرها، و يعتبر فى هذا أيضاً أن يكون إعمال الآلة بقصد الاصطياد و التملك، فلو رماه عبثاً أو هدفاً أو لغرض آخر لم يملكه، فلو أخذه شخص آخر بقصد التملك ملكه.

مسألة ١٦ ـ الظاهر أنه يلحق بآلة الاصطياد كل ما جعل وسيلة لا ثبات الحيوان و زوال امتناعه ولو بحفر حفيرة في طريقه ليقع فيها فوقع، أو باتخاذ أرض و إجراء الماء عليها لتصير موحلة فيتوحل فيها فتوحل، أو فتح باب شيء ضيق و إلقاء الحبوب فيه ليدخل فيه العصافير فأغلق عليها و زوال امتناعها، و أما لو فتح باب البيت لذلك فدخلت فيه مع بقائها على امتناعها في البيت فالظاهر عدم تملكه به مع إغلاق الباب، كما أنه لو عشش الطير في داره لم يملكه بمجرده، و كذا لو توحل حيوان في أرضه الموحلة ما لم يجعلها كذلك لأجل الاصطياد، فلو أخذه شخص بعد ذلك ملكه و إن عصى لو دخل داره أو أرضه بغير إذنه.

مسألة ١٧ ـ لو سعى خلف حيوان حتى أعياه و وقف عن العدو لم يملكه ما لم يأخذه، فلو أخذه غيره قبل أن يأخذه ملكه.

مسألة ١٨ ـ لو وقع حيوان في شبكة منصوبة للاصطياد و لم تمسكه الشبكة لضعفها وقوته فانفلت منها لم يملكه ناصبها، و كذا إن أخذ الشبكة و انفلت بها من دون أن يزول عنه الامتناع، فان صاده غيره ملكه ورد الشبكة إلى صاحبها، نعم لو أمسكته الشبكة و أثبتته ثم انفلت منها بسبب من الأسباب الخارجية لم يخرج بذلك عن ملكه، كما لو أمسكه بيده ثم انفلت منها، و كذا لو مشى بالشبكة على وجه لا يقدر على الامتناع فانه لناصبها، فلو أخذه غيره يجب أن يرده إليه.

مسألة ١٩ ـ لو رماه فجرحه لكن لم يخرج عن الامتناع فدخل داراً فأخذه صاحبها ملكه بأخذه لا بدخول الدار، كما أنه لو رماه و لم يثبته فرماه شخص آخر فأثبته فهو للثاني.

trained dog, or otherwise, as a stone, wood, a panther, a hawk or an eagle, etc.

In case of these too, it is a condition that they must be used with the intention of hunting and possession.

If a person throws them aimlessly, or on another target or with another intention, the prey shall not belong to him. So if some other person catches it with the intention of possessing it, it shall belong to him.

Problem # 16. Apparently every device that is adopted for stopping the animal or removal of its resistance, including even digging a pit in its way so that it may fall into it, throwing water on the earth in order to make it a marsh so that the animal is trapped in the marsh, or opening the door of a narrow place and throwing grains on it so that birds may enter it and the door may be closed and the birds may lose resistance. If, however, the door of the house is left open for this purpose, and the birds should enter into it continuing to be able to resist in the house, then apparently the hunter shall have no right of possession of the birds by closing the door, in the same way as when a bid makes a nest in a person's house, he shall not become its owner simply [by being the owner of the house]. The same shall be the case if an animal is trapped in his marshy land that has not been made marshy by him for the purpose of hunting the animal. So if some other person catches it later, it shall belong to him, even if trespasses into his house or land without his permission.

Problem # 17. If a person runs after an animal till it becomes tired, and stops running, it shall not belong to the chaser until he catches it. So if a person other than the chaser catches it, it shall belong to him.

Problem # 18. If an animal falls into the trap laid for hunting, but the net does not retain it due to its weakness and strength of the animal. So the animal escapes from it; it shall not belong to the person laying the trap. The same shall be the case if a person catches an animal with the help of a rope and the animal escapes from it before it loses its resistance. If another person hunts it, it shall belong to him, and he shall return the net. If, however, the net retains the animal and then the animal escapes due to any external reason, he shall not lose the right of ownership over it, in the same way as he retains it in his land and then it escapes from his hand. Likewise, if the animal escapes along with the net in a way that it is not able to free itself, it shall belong to the person laying the trap.

So if some person other than him catches it, he shall return it to him.

Problem # 19. If a person throws an arrow on an animal, wounding it, but without the animal losing its resistance, and then it enters a house and its owner catches it, it shall belong to the owner of the house by catching it, not because being the owner of the house, in the same way as when a person throws an arrow on an animal, but it does not lose control, then another person throws an arrow on it, thereby the animal loses control, it shall belong to the latter.

Problem # 20. If a hunter sets its prey free. Then if he does not intend to turn way from it, he shall not lose his right of its ownership, and another person shall not become its owner by hunting it. If, however, he intends to turn away from it and abandon its ownership, then apparently it shall become lawful for

مسألة ٢٠ ـ لو أطلق الصائد صيده فان لم يقصد الاعراض عنه لم يخرج عن ملكه و لا يملكه غيره باصطياده، و إن قصد الاعراض و زوال ملكه عنه فالظاهر أنه يصير كالمباح، جاز اصطياده لغيره و يملكه، و ليس للأول الرجوع إليه بعد تملكه على الأقوى.

مسألة ٢١ ـ انما يملك غير الطير بالاصطياد إذا لم يعلم كونه ملكاً للغير ولو من جهة آثار اليد التي هي أمارة على الملك فيه كما إذا كان طوق في عنقه أو قرط في أذنه أو شد حبل في أحد قوائمه، ولو علم ذلك لم يملكه الصائد بل يرد إلى صاحبه إن عرفه، و إن لم يعرفه يكون بحكم اللقطة، و أما الطير فان كان مقصوص الجناحين كان بحكم ما علم أن له مالكاً فيردّ إلى صاحبه إن عرف، و إن لم يعرف كان لقطة، و أما إن ملك جناحيه يتملك بالاصطياد إلا اذا كان له مالك معلوم فيجب ردّه اليه، و الأحوط فيما اذا علم أن له مالكاً ولو من جهة وجود آثار اليد فيه و لم يعرفه أن يعامل معه معاملة اللقطة كغير الطير.

مسألة ٢٢ ـ لو صنع برجاً لتعشيش الحمام فعشش فيه لم يملكه خصوصاً لو كان الغرض حيازة زرقه مثلاً، فيجوز لغيره صيده، و يملك ما صاده، بل لو أخذ حمامة من البرج ملكها و إن أثم من جهة الدخول فيه بغير إذن صاحبه، و كذلك لو عشش في بئر مملوكة و نحوها، فانه لا يملكه مالكها.

مسألة ٢٣ ـ الظاهر أنه يكفي في تملك النحل غير المملوكة أخذ أميرها، فن أخذه من الجبال مثلاً و استولى عليه يملكه و يملك كل ما تتبعه من النحل مما تسير بسيره و تقف بوقوفه و تدخل الكن و تخرج منه بدخوله و خروجه.

مسألة ٢٤ ـ ذكاة السمك إما باخراجه من الماء حياً أو بأخذه بعد خروجه منه قبل موته سواء كان ذلك باليد أو بآلة كالشبكة و نحوها، فلو وثب على الجدّ أو نبذه البحر إلى الساحل أو نضب الماء الذي كان فيه حل لو أخذه شخص قبل أن يموت، و حرم لو مات قبل أخذه و إن أدركه حياً ناظراً اليه على الأقوى.

مسألة ٢٥ ـ لا يشترط في تذكية السمك عند إخراجه من الماء أو أخذه بعد

others, and it can be lawfully hunted and owned by any other person, and, according to the stronger opinion, the former shall not be entitled to have recourse to the latter after the latter comes to possess it.

Problem # 21. An animal other than a bird can be owned by hunting only when it is known that it does not belong to another, even if through the signs of possession indicating ownership, as when there a collar in its neck, a ring in its ear or rope in any of its leg. If it is known, it shall not belong to the hunter; rather, he shall return it to its owner if he knows him. If he does not know him, it shall be treated as a *Luqaṭah* (or foundling). As regards a bird, if both of its wings are clipped, it shall be a sign of belonging to an owner, and so it shall be returned to its owner, if he is known; otherwise, it shall also be treated as a foundling. If, however, both of its wings are intact, it can be owned by hunting, except when its owner is known, so that it shall be returned to him. According to the more cautious opinion, in case it is known that the animal belongs to some owner, even if due to the signs of possession in it, but without knowing him, it shall be treated as foundling like other birds.

Problem # 22. If a person builds a tower for keeping pigeons, and the pigeons make nest in it, the nest shall not belong to him, particularly when his intention, for example, is the collection of their excrement. So another person shall be entitled to hunt and own them. Rather, if he catches a pigeon from the tower, it shall belong to him, though he shall be considered to have sinned due to entering it without the permission of its owner. The same shall be the case if the pigeons should make a nest in a well or the like belonging to someone, in which case too the nest shall not belong to its owner.

Problem # 23. Apparently for ownership of ownerless honey-bees it is sufficient to catch their leader, so that by catching it, for example, from the mountains and controlling it, the person shall own it and all those bees that follow it, as they move when it moves and stop when it stops, and enter the hive when it enters it and leave it when it leaves it.

Problem # 24. The cleaning of a fish takes place by taking it out of the water while it is still alive, or catching it after it comes out of the water before it is dead, irrespective of its being done by hand or with the help of a an instrument like a net or the like. If the fish jumps into the boat, or he throws it from the sea on the seashore, or the water in which it was seeps, it shall be lawful for any one to catch it before it dies, but, according to the stronger opinion, it shall become forbidden for eating if it dies before one catches it, even if he reaches it when it is still alive and he looks on it.

Problem # 25. There is no condition of pronouncing Allāh's attribute at the time of taking a fish out of water or catching it after it comes out of water in order to clean it, as also it is not a condition for its hunter that he must be a Muslim. So if an infidel takes it out of the water or catches it and it dies after he has caught it, it shall be lawful for eating [by a Muslim], regardless whether he is a *Kitābī* or otherwise. Of course, if one finds it already dead in his possession, it shall not be lawful to eat it unless he knows that it had died out of the water after it had been taken out of the water, or that the hunter had caught it after it had come out of the water but before it died. But this can neither be established simply because of its being in his possession, nor by his statement to that effect, contrary to the case when it is in the possession of a Muslim, in which case it shall be treated as already cleaned unless knowledge about its

خروجه التسمية، كما أنه لا يعتبر في صائده الاسلام، فلو أخرجه كافر أو أخذه فمات بعد أخذه حل، سواء كان كتابياً أو غيره. نعم لو وجده في يده ميتاً لم يحل أكله ما لم يعلم أنه قد مات خارج الماء بعد إخراجه أو أخذه بعد خروجه و قبل موته، و لا يحرز ذلك بكونه في يده، و لا بقوله لو أخبر به بخلاف ما إذا كان في يد المسلم، فانه يحكم بتذكيته حتى يعلم خلافها.

مسألة ٢٦ - لو وثب من الماء سمكة إلى السفينة لم يحل ما لم يؤخذ باليد، و لم يملكه السفان و لا صاحب السفينة، بل كل من أخذه بقصد التملك ملكه، نعم لو قصد صاحب السفينة الصيد بها بأن يجعل فيها ضوء بالليل و دق بشيء كالجرس ليثب فيها السموك فو ثبت فيها فالوجه أنه يملكها و يكون وثوبها فيها بسبب ذلك بمنزلة إخراجها حياً، فيكون به تذكيتها.

مسألة ٢٧ - لو نصب شبكة أو صنع حظيرة في الماء لاصطياد السمك فكل ما وقع و احتبس فيها ملكه، فان أخرج ما فيها من الماء حياً حل بلا إشكال، و كذا لو نضب الماء و غار ولو بسبب جزره فمات فيها بعد نضوبه، و أما لو مات في الماء فهل هو حلال أم لا؟ قولان أشهرهما و أحوطهما الثاني، بل لا يخلو من قوة، ولو أخرج الشبكة من الماء فوجد بعض ما فيها أو كله ميتاً ولم يدر أنه قد مات في الماء أو بعد خروجه فالأحوط الاجتناب عنه.

مسألة ٢٨ - لو أخرج السمك من الماء حياً ثم أعاده إليه مربوطاً أو غير مربوط فمات فيه حرم.

مسألة ٢٩ - لو طفا السمك على الماء وزال امتناعه بسبب - مثل أن ضرب بمضراب أو بلع ما يسمى بالزهر في لسان بعض الناس أو غير ذلك فان أدركه شخص و أخذه و أخرجه من الماء قبل أن يموت حل، و إن مات على الماء حرم، و إن ألقى الزهر أحد فبلعه السمك و صار على وجه الماء وزال امتناعه فان لم يكن بقصد الاصطياد لم يملكه، فلو أخذه غيره ملكه، من غير فرق بين ما إذا قصد سمكاً معيناً أولا، و إن كان بقصد الاصطياد و التملك فلا يبعد أن تكون إزالة

being otherwise is obtained.

Problem # 26. If a fish jumps out of the water into a boat, it shall not be lawful [for any one] unless he catches it, and it shall neither belong to any one on board nor to the owner of the boat. Rather it shall belong to any one who catches it for possessing it. Of course, if the owner of the boat intends to hunts by lighting the boat at night and keeps something like a bell ringing so that the fish may jump into the boat. If his plan succeeds, then it shall be justified to say that the fish shall belong to him, and the jumping by the fish shall be treated equivalent to his taking it out of the water alive, and it shall thereby amount to cleaning.

Problem # 27. If a person lays net or places a fence in the water for hunting the fish, every fish that falls into them and is enmeshed in it shall belong to him. If he takes out from the water what lies in the net or fence alive, it shall belong to him without any hesitation. The same shall be the case , if the water seeps into the ground and becomes shallow due to the ebb, and the fish die in the net or fence due to the seepage. If, however, they die in the water, then whether they shall be lawful or not, there are two opinions in this regard, the latter being more prevalent and more cautious; rather it shall not be devoid of force. If he pulls out the net from the water, and finds some or all of the fish dead, without knowing as to whether they had died while still in the water or after they had been taken out of the water, then, according to the more cautious opinion, he must abstain [from treating them as lawful].

Problem # 28. If a person takes out fish alive out of water and then throws them back into the water duly fastened or unfastened, and then they die in the water, they shall be forbidden [for a Muslim].

Problem # 29. If a fish appears on the surface of the water and loses resistance due to being hit by some hitting rod or swallowing what is known as poison in the parlance of some common people, etc., then if it is found and caught by anyone, and he pulls it out of the water before it dies, it shall be lawful [to eat]. If someone throws so-called poison [into the water], and a fish swallows it and appears on the surface of the water and loses resistance, then if it was not done with the intention of hunting it, it shall not belong to that person, so that if any one else catches it, it shall belong to him, without there being difference whether the person intended a particular fish or not. If, however, he does it with the intention of hunting and possessing it, then it is not far from removal of any hurdle in his claim of its ownership, so that it shall not belong to any one else by catching it. The same shall be the case if the fish has lost resistance due to something else as the use of an instrument, as when the person hits it with a bullet and it appears on the surface of the water. In short, if the fish loses resistance as a result one's intention of hunting and possessing it, it shall be a sufficient ground for its possession and ownership by him.

Problem # 30. It is not a condition for the lawfulness of a fish after it has been taken out of the water alive or is caught alive after it comes out of the water that it must die out of the water by itself. If a

امتناعه مملكاً له، فلا يملكه غيره بالأخذ، و كذا الحال إذا كان إزالة امتناعه بشيء آخر كاستعمال آلة كما إذا رماه بالرصاص فطفا على الماء، و بالجملة لا يبعد أن تكون إزالة امتناعه بقصد الاصطياد و التملك مطلقا موجبة للملكية كالحيازة.

مسألة ٣٠ ـ لا يعتبر في حلية السمك بعد ما أخرج من الماء حياً أو أخذ حياً بعد خروجه أن يموت خارج الماء بنفسه، فلو قطعه قبل أن يموت و مات بالتقطيع أو غيره حل أكله، بل لا يعتبر في حله الموت رأساً، فيحل بلعه حياً، بل لو قطع منه قطعة و أعيد الباقي إلى الماء حل ما قطعه سواء مات الباقي في الماء أم لا، نعم لو قطع منه قطعة و هو في الماء حي أو ميت لم يحل ما قطعه.

مسألة ٣١ ـ ذكاة الجراد أخذه حياً سواء كان باليد أو بالآلة، فلو مات قبل أخذه حرم، و لا يعتبر فيه التسمية و لا الاسلام كما مر في السمك، نعم لو وجده ميتاً في يد الكافر لم يحل ما لم يعلم بأخذه حياً، و لا تجدي يده و لا إخباره في إحرازه.

مسألة ٣٢ ـ لو وقعت نار في أجمة و نحوها فأحرقت ما فيها من الجراد لم يحل و ان قصده المحرق، نعم لو مات بعد أخذه بأيّ نحو كان حل، كما أنه لو فرض كون النار آلة صيد الجراد بأنه لو أججها اجتمعت من الأطراف و ألقت أنفسها فيها فأججت لذلك فاجتمعت و احترقت بها لا يبعد حليتها.

مسألة ٣٣ ـ لا يحل من الجراد ما لم يستقل بالطيران، و هو المسمى بالدبى على وزن «عصا» و هو الجراد إذا تحرك و لم تنبت بعدُ أجنحته.

القول في الذباحة

والكلام في الذابح و آلة الذبح و كيفيته و بعض الأحكام المتعلقة به في طي مسائل:

person cuts it into pieces before its dies and it dies as a result of cutting it into pieces or otherwise, it shall be lawful to eat it. Rather it is not a condition that it must be alive at all, and it shall be lawful to swallow it alive. Rather if a person cuts a piece of it and throws the rest back into the water, the piece [cut out of the fish] shall be lawful to eat, regardless whether the rest of it dies in the water or not. Of course, if a person cuts a piece of the fish, while it is alive in the water or is dead, the piece cut out from it shall not be lawful.

Problem # 31. The cleaning of a locust takes place by catching it alive, regardless whether it is done by hand or with the help of some instrument. If it dies before it is caught, it shall become unlawful. It is neither a condition to pronounce Allāh's name [at the time of catching or killing it], nor is it a condition that its hunter must be a Muslim, as already mentioned in case of a fish. Of course, if a person finds it dead in the possession of an infidel, it shall not be lawful to eat it unless it is known that it was caught while still alive, but that cannot be ascertained merely by its being in the possession of the infidel or by his statement [to the effect that he had caught it alive].

Problem # 32. If the thicket, etc., [of the locust] catches fire, and the locust lying it is burnt, it shall not be lawful [to eat it], even the person has deliberately put the thicket to fire. Of course, if it dies after being caught in whatever way, it shall be lawful to eat it, in the same way as if suppose the fire is a means for hunting the locust so that if the thicket is put to fire the locusts assemble there from all around and fall into the fire. So the thicket is put to fire as a result of which the locusts assemble there and are burnt in it, it shall not be far from being lawful to eat them.

Problem # 33. It is not lawful to eat the locust unless it becomes able to fly, and it is called *Dabā* and pronounced as *' Aṣā* , that means a locust that starts moving [after birth] but whose wings are not yet grown.

Chapter Two - Slaughtering (*Dhabāḥah*)

Here is a discussion the slaughterer, instrument of slaughtering, its method and some of the relevant rules given under the following Problems.

Problem # 1. It is a condition in the slaughterer that he must be a Muslim or one treated as such, as one born of a Muslim [parents]. So an animal slaughtered by an infidel, irrespective of his being a polytheist or otherwise, according to the stronger opinion, including even a *Kitābī*. It is not a condition that he must be a *Mu'min* (or a *Shī'ah*). So an animal slaughtered by a person belonging to any of the

مسألة ١ ـ يشترط في الذابح أن يكون مسلماً أو بحكمه كالمتولد منه فلا تحل ذبيحة الكافر مشركاً كان أم غيره حتى الكتـابي على الأقوى، و لا يشترط فيه الايمان، فتحل ذبيحة جميع فرق الاسلام عدا الناصب و إن أظهر الاسلام.

مسألة ٢ ـ لا يشترط فيه الذكورة و لا البلوغ و لا غير ذلك ، فتحل ذبيحة المرأة فضلاً عن الخنثى، و كذا الحائض و الجنب و النفساء و الطفل إذا كان مميزاً و الأعمى و الأغلف و ولدالزنا.

مسألة ٣ ـ لا يجوز الذبح بغير الحديد مع الاختيار، فان ذبح بغيره مع التمكن منه لم يحل و إن كان من المعادن المنطبعة كالصفر و النحاس و الذهب و الفضة و غيرها، نعم لو لم يوجد الحديد وخيف فوت الذبيحة بتأخير ذبحها أو اضطر إليه جاز بكل ما يفري أعضاء الذبح، ولو كان قصباً أو ليطة أو حجارة حادة أو زجاجة أو غيرها، نعم في وقوع الذكاة بالسن و الظفر مع الضرورة إشكال و إن كان عدم الوقوع بهما في حال اتصالهما بالمحل لا يخلو من رجحان، و الأحوط الاجتناب مع الانفصال أيضاً و إن كان الوقوع لا يخلو من قرب.

مسألة ٤ ـ الواجب في الذبح قطع تمام الأعضاء الأربعة: الحلقوم، و هو مجرى النفس دخولاً و خروجاً، و المريء، و هو مجرى الطعام و الشراب و محله تحت الحلقوم، و الودجان، و هما العرقان الغليظان المحيطان بالحلقوم أو المريء، و ربما يطلق على هـذه الأربعة الأوداج الأربعة، و اللازم قطعها و فصلها، فلا يكفي شقها من دون القطع والفصل.

مسألة ٥ ـ محل الذبح في الحلق تحت اللحيين على نحو يقطع به الأوداج الأربعة، و اللازم وقوعه تحت العقدة المسماة في لسان أهل هذا الزمان بالجوزة، و جعلها في الرأس دون الجثة و البدن بناءً على ما يدعى من تعلق الحلقوم أو الأعضاء الأربعة بتلك العقدة على وجه لو لم تبق في الرأس بتمامها ولم يقع الذبح من تحتها لم تقطع الأوداج بتمامها، و هذا أمر يعرفه أهل الخبرة، فان كان الأمر كذلك أو لم يحصل العلم بقطعها بتمامها بدون ذلك فاللازم مراعاته، كما أنه

sects of Islam is lawful [to eat] excluding a *Nāṣib*, even if he professes Islam.

Problem # 2. It is also not a condition that the slaughterer must be a male or an adult, etc. So an animal slaughtered by a woman, or even a hermaphrodite is lawful [to eat]. The same is the case of a woman having menstrual or puerperal blood, a *Junub*, a discreet child, a blind person, one who has not been circumcised and an illegitimate person.

Problem # 3. It is not lawful to slaughter with an instrument not made of iron, if an iron instrument is available. If a person slaughters an animal with an instrument not made of iron, even in case an instrument of iron is available, it shall not be lawful [to eat], even if it is made of copper, brass, gold, silver, etc. Of course, if an instrument of iron is not available, and there is apprehension of the loss of the animal due to delay in slaughtering it, or there is an emergency for it, it shall be permissible to use any instrument that can cut the parts of the body of the animal that are required to be cut in slaughtering the animal, even if it is a reed, the rod of a lance, a sharp stone, a piece of glass, etc.

Of course, there is hesitation in slaughtering an animal with teeth or nails in case of emergency. Their unlawfulness is not devoid of preference even if they are connected with the part of the body to be slaughtered. According to the more cautious opinion, one must abstain from slaughtering in this way even if they are apart from such parts of the body of the animal, though it is not far from the slaughtering taking place [lawfully in such case].

Problem # 4. In slaughtering an animal it is compulsory to cut four parts of the body of the animal, namely, the throat, that is the channel for inhaling and exhaling breath, the esophagus, that is the passage of food and drinks and it is situated under the throat, the two jugular veins, that are two thick veins surrounding the throat or esophagus, sometimes they are called four jugular veins. It is necessary to cut them apart, and it is not sufficient merely to cut them unless they are cut apart.

Problem # 5. The point of slaughtering the throat lies under the jawbones in a way that the four jugular veins are cut [apart]. It is necessary to cut from under the knot known as *Jowzah* in current public parlance, and that must be towards the head and not the body because the throat or the four jugular veins are connected with that knot in a way that if it is not fully cut towards the head and under the knot, all the jugular veins shall not be fully cut. Those having its knowledge are conversant with it.

In such case, if cutting of all the parts fully is not known without it, it is necessary to observe it, as it is necessary that all the four jugular veins have been cut towards the head and separated from what is adjacent to the head.

يلزم أن يكون شيء من كل من الأوداج الأربعة على الرأس حتى يعلم أنها انقطعت و انفصلت عما يلي الرأس.

مسألة ٦ ـ يشترط ان يكون الذبح من القدام، فلو ذبح من القفا و أسرع إلى أن قطع ما يعتبر قطعه من الأوداج قبل خروج الروح حرمت، نعم لو قطعها من القدام لكن لا من الفوق بأن أدخل السكين تحت الأعضاء و قطعها إلى الفوق لم تحرم الذبيحة و إن فعل مكروها على الأوجه، و الأحوط ترك هذا النحو.

مسألة ٧ ـ يجب التتابع في الذبح بأن يستوفي قطع الأعضاء قبل زهوق الروح، فلو قطع بعضها و أرسل الذبيحة حتى انتهت إلى الموت ثم قطع الباقي حرمت، بل لا يترك الاحتياط بأن لا يفصل بينها بما يخرج عن المتعارف المعتاد ولا يعد معه عملاً واحداً عرفاً بل يعد عملين و إن استوفى التمام قبل خروج الروح منها.

مسألة ٨ ـ لو قطع رقبة الذبيحة من القفا و بقيت أعضاء الذباحة فان بقيت لها الحياة المستكشفة بالحركة ولو يسيرة بعد الذبح و قطع الأوداج حلت، و إن كان لها حركة ولو يسيرة قبل الذبح ذبحت، فان خرج مع ذلك الدم المعتدل حلت، و إلا فان لم تتحرك حتى يسيراً قبل الذبح حرمت و إن تحركت قبله و لم يخرج الدم المعتدل فحل إشكال.

مسألة ٩ ـ لو أخطأ الذابح و ذبح من فوق العقدة و لم يقطع الأعضاء الأربعة فان لم تبق لها الحياة حرمت، وإن بقيت يمكن أن يتدارك بأن يتسارع إلى إيقاع الذبح من تحت و قطع الأعضاء و حلّت، واستكشاف الحياة كما مر.

مسألة ١٠ ـ لو أكل الذئب مثلاً مذبح الحيوان و أدركه حياً فان أكل تمام الأوداج الأربعة بتمامها بحيث لم يبق شيء منها و لا منها شيء فهو غير قابل للتذكية و حرمت، و كذا إن أكلها من فوق أو من تحت و بقي مقدار من الجميع معلقة بالرأس أو متصلة بالبدن على الأحوط، فلا يحل بقطع ما بقي منها، و كذلك لو أكل بعضها تماماً و أبقى بعضها كذلك كما إذا أكل الحلقوم بالتمام وأبقى الباقي

Problem # 6. It is necessary that the slaughter must take place from the fore part of the neck. If it is done from the back of the neck and it is done even earlier than cutting the four jugular veins before the departure of the soul, it shall be forbidden. Of course, if one cuts from the fore part, but not from above, in a way that the knife enters under the parts of the body and cuts them towards above, the animal shall nor be unlawful, though, more in accordance with the guiding principles, he shall be considered to have committed a disapproved act. It is more cautious to give up such method.

Problem # 7. It is obligatory to adopt sequence in slaughtering an animal so that cutting the parts of its body is completed before its soul departs. So if a person cuts some of the parts and leaves the animal until it dies, and then cuts the remaining parts of the body, it shall be unlawful. Rather, one must not give up the caution of having a distance between the cutting of the parts in a way that it may go beyond the usual manner and may not be considered a single act according to the prevalent usage but two separate acts, even if they are completed before the departure of the soul from the body of the animal.

Problem # 8. If a person cuts the neck of an animal from the back, leaving the parts required to be slaughtered, then if there remain some signs of life indicated by a movement, though slight, before the slaughter, and the animal is slaughtered resulting in an average bleeding, it shall be lawful. Otherwise, if the animal does not move, even slightly, before the slaughter, it shall be unlawful [to eat]. If, however, there is some movement in it before the slaughter, but there is no average bleeding, then there is hesitation in declaring it lawful.

Problem # 9. If the slaughterer commits error and slaughters the animal from, above the knot without cutting the four parts of its body, then if there remains no life in it, it shall be unlawful [to eat]. If, however, there remains life in the animal, it may be possible to make haste in slaughtering it from under the knot and cutting the four parts of its body, it shall be lawful [to eat]. The method of finding life in the animal is what has already been mentioned.

Problem # l0. If a wolf has eaten, for example, the parts of the body of an animal required to be slaughtered, but a person finds it alive, then if it has eaten all its four jugular veins in a way that remains nothing out of them, then it cannot be cleaned [or slaughtered in the lawful manner], and shall be unlawful [to eat]. According to the more cautious opinion, the same shall be the case if the wolf has eaten from above or from under, and there remains an amount of the jugular veins hanging from the head or attached with the body, so that it shall not become lawful by cutting the remaining part of its body. The same shall be the case if the wolf has eaten some of the parts completely and there remain some of them.

Likewise, if the wolf has eaten the entire throat of the animal and there remain the rest as mentioned, then if he cuts the rest according to the required conditions, there shall be hesitation in the cleaning [or slaughtering it lawfully], and so caution must not be given up.

كذلك ، فلو قطع الباقي مع الشرائط يشكل وقوع التذكية عليه، فلا يترك الاحتياط.

مسألة ١١ـ يشترط في التذكية الذبحية مضافاً إلى ما مر أمور:

أحدها ـ الاستقبال بالذبيحة حال الذبح بأن يوجّه مذبحها و مقاديم بدنها إلى القبلة، فان أخل به فان كان عامداً عالماً حرمت، و إن كان ناسياً أو جاهلاً أو مخطئاً في القبلة أو في العمل لم تحرم، ولو لم يعلم جهة القبلة أو لم يتمكن من توجيهها إليها سقط هذا الشرط، و لا يشترط استقبال الذابح على الأقوى و إن كان أحوط و أولى.

ثانيها ـ التسمية من الذابح بأن يذكر اسم الله عليها حينما يتشاغل بالذبح أو متصلاً به عرفاً أو قبيله المتصل به، فلو أخل بها فان كان عمداً حرمت، و إن كان نسياناً لم تحرم، و في إلحاق الجهل بالحكم بالنسيان أو العمد قولان، أظهرهما الثاني، و المعتبر في التسمية وقوعها بهذا القصد أعني بعنوان كونها على الذبيحة، و لا تجزي التسمية الاتفاقية الصادرة لغرض آخر.

ثالثها ـ صدور حركة منها بعد تمامية الذبح كي تدل على وقوعه على الحي ولو كانت يسيرة مثل أن تطرف عينها أو تحرك أذنها أو ذنبها أو تركض برجلها و نحوها، و لا يحتاج مع ذلك إلى خروج الدم المعتدل، فلو تحرك و لم يخرج الدم أو خرج متثاقلاً و متقاطراً لا سائلاً معتدلاً كفى في التذكية، و في الاكتفاء به أيضاً حتى يكون المعتبر أحد الأمرين من الحركة أو خروج الدم المعتدل قول مشهور بين المتأخرين، ولا يخلو من وجه، لكن لا ينبغي ترك الاحتياط، هذا إذا لم يعلم حياته، وأما إذا علم حياته بخروج هذا الدم فيكتفى به بلا اشكال.

مسألة ١٢ ـ لا يعتبر كيفية خاصة في وضع الذبيحة على الأرض حال الذبح، فلا فرق بين أن يضعها على الجانب الأيمن كهيئة الميت حال الدفن و أن يضعها على الأيسر.

مسألة ١٣ ـ لا يعتبر في التسمية كيفية خاصة و أن تكون في ضمن البسملة،

Problem # 11. In a slaughtering cleaning the following conditions are required in addition to those already mentioned.

First. Facing Qiblah at the time of slaughtering so that the parts of the body and the fore parts of the animal to be slaughtered must face the Qiblah. If he violates it and it is deliberate and full knowledge of its being forbidden, the animal shall be rendered unlawful to eat. In case it was due to forgetfulness, ignorance or erroneous facing the Qiblah or some error in the action, it shall not be rendered unlawful to eat. If the person does not know the direction of the Qiblah or it is not possible to make both the required parts face the Qiblah, this condition shall drop. According to the stronger opinion, it is not a condition for the slaughterer to face the Qiblah, though it would be more cautious and preferable.

Second. The utterance of Allāh's name at the time of starting the slaughter, without any break according to the prevalent usage or somewhat before but continuous with slaughtering act. If he violates it, and it was deliberate, the animal shall be rendered unlawful to eat. If, however, it was due forgetfulness, it shall not be rendered unlawful. As regards the affiliation of ignorance about the law with forgetfulness or deliberate violation, there are two opinions, the one in conformity with the traditional authority being in favour of the latter. It is a condition that the utterance of Allāh's name must be made with the intention of being made at the time of the slaughter, and it is sufficient to have made the utterance incidentally for some other purpose.

Third. Movement taking place in the animal after the completion of the slaughter as an evidence of the slaughter taking place on a live animal, even if it was slight, as it rolls its eyes, or shakes its ears or tail or kicks with its legs, or the like. In the presence of all such conditions, average bleeding is not a condition. So if the animal has moved but no bleeding takes place or its takes place in thick form or drop by drop and not with the average flow, it shall be sufficient for its cleaning. In its being sufficient, according to the prevalent opinion of the later jurists it is a condition that either there must be movement or average bleeding, and this opinion is not devoid of significance, but caution must not be given up. This is the case when there is no knowledge about its being alive. In case, however, there is knowledge about the animal being alive due to such bleeding, it shall be sufficient without any hesitation.

Problem # 12. There is no special condition for laying the animal on the ground at the time of slaughtering it, and there shall be no difference whether it is laid on the right side as a dead body at the time burial or on the left side.

Problem # 13. There is no condition of special position at the time of uttering Allāh's name and it is also not a condition that it must in the form of the formula of *Basmalah* [namely, *Bismillāh ir- Raḥmān ir-Raḥīm*, meaning in the name of Allāh, the Beneficent, the Merciful], but the requirement is utterance signifying Allāh's name. So it is sufficient to utter "*Bismaillāh*" (In the name of Allāh), "*Allāhu Akbar*" (Allāh is Great), "*Al-Hamdu lillāh*" (Praise be to Allāh), or "*Lā ilaha Illallāh*" (There is no god but Allāh), or

بل المدار صدق ذكر اسم الله عليها، فيكفي أن يقول: «بسم الله» أو «الله أكبر» أو «الحمدلله» أو «لا إله إلا الله» و نحوها، وفي الاكتفاء بلفظ «الله» من دون أن يقرن بما يصير به كلاماً تاماً دالاً على صفة كمال أو ثناء أو تمجيد إشكال، نعم التعدي من لفظ «الله» إلى سائر أسمائه الحسنى كالرحمان و الباريء و الخالق وغيرها من أسمائه الخاصة غير بعيد، لكن لا يترك الاحتياط فيه، كما أن التعدي إلى ما يرادف لفظ الجلالة في لغة أخرى كلفظة «يزدان» في الفارسية و غيرها في غيرها لا يخلو من وجه وقوة، لكن لا ينبغي ترك الاحتياط بمراعاة العربية.

مسألة ١٤ ـ الأقوى عدم اعتبار استقرار الحياة في حلية الذبيحة بالمعنى الذي فسروه، و هو أن لا تكون مشرفة على الموت بحيث لا يمكن أن يعيش مثلها اليوم أو نصف اليوم، كالمشقوق بطنه والمخرج حشوته و المذبوح من قفاه الباقية أوداجه و الساقط من شاهق و نحو ها، بل المعتبر أصل الحياة ولو كانت عند إشراف الخروج، فان علم ذلك فهو، و إلا يكون الكاشف عنها الحركة بعد الذبح ولو كانت يسيرة كما تقدم.

مسألة ١٥ ـ لا يشترط في حلية الذبيحة بعد وقوع الذبح عليها حياً أن يكون خروج روحها بذلك الذبح، فلو وقع عليها الذبح الشرعي ثم وقعت في نار أو ماء أو سقطت من جبل و نحو ذلك فماتت بذلك حلت على الأقوى.

مسألة ١٦ ـ يختص الابل من بين البهائم بكون تذكيتها بالنحر، كما أن غيرها يختص بالذبح، فلو ذبحت الابل أو نحر غيرها كان ميتة، نعم لو بقيت له الحياة بعد ذلك أمكن التدارك بأن يذبح ما يجب ذبحه بعد ما نحر أو ينحر ما يجب نحره بعد ما ذبح و وقعت عليه التذكية.

مسألة ١٧ ـ كيفية النحر و محله أن يدخل سكيناً أو رمحاً و نحوهما من الآلات الحادة الحديدية في لبته، و هي المحل المنخفض الواقع بين أصل العنق و الصدر، و يشترط فيه كل ما اشترط في التذكية الذبحية، فيشترط في الناحر ما اشترط في

the like. Whether it is sufficient to utter the word "Allāh" without accompanying what may make it a complete sentence signifying the quality of Perfection, Praise and Adoration, there is hesitation. Of course, it is not far from being justified in any of the other Excellent Attributes of Allāh as *al-Rahmān* (The Beneficent), *al-Bārī'u* [The Shaper), *al-Khāliqu* (The Creator), etc. from among the Special Attributes of Allāh, though caution must not be given up in such case, as uttering what is equivalent to "Glorious" in any other language, as "*Yazdān*" in Persian, etc. , or other such words are not devoid of significance and force, but caution must not be given up by using Arabic.

Problem # 14. According to the stronger opinion it is not a condition to observe the condition of the animal being alive for lawfulness to eat as explained by some jurists, and that is the animal being at the threshold of death in a way that it is not possible for an animal like it to remain alive for a half or full day, as one whose stomach has been split and its entrails have come out, or one that is slaughtered from the back of the neck whose jugular veins are intact, or one that has fallen from a high altitude, or the like. Rather what is required is the last spark of life, even if it is on the verge of death, so that if there is knowledge about it, it shall be sufficient. Otherwise, there may be a sign of it as a movement after slaughter, even if it is slight, as mentioned before.

Problem # 15. It is not a condition for an animal slaughtered while still alive for being lawful to eat that its soul must leave its body as a result of slaughtering it. So if an animal has been slaughtered in a lawful manner and then it falls into fire or water or falls from a mountain, or the like, and then dies as a result of that, according to the stronger opinion, it shall be lawful to eat it.

Problem # 16. It is particularly with a camel that its cleaning takes place by *Naḥr* (slaughter by piercing a spear in neck of an animal), while it takes place by *Dhabḥ* (slaughtering by slitting the throat of an animal). If a camel is slaughtered by slitting its throat or an animal other than a camel is slaughtered by piercing a spear in its neck, it shall be treated as dead [and so unlawful to eat]. Of course, if there is life left in an animal after it, it may be compensated by slaughtering by slitting the throat of the animal that must be slaughtered in this way after it has been slaughtered by piercing a spear in its neck, or by piercing a spear in the neck of the animal that much be slaughtered in this way after it has been slaughtered by slitting its neck, and thereby it shall be rendered lawful to eat.

Problem # 17. The process of performing a *Naḥr* and the part of the camel's body where it is to be performed is that a knife or spear, or any iron sharp weapon is pierced into the lower part of the actual neck and breast of the camel. All the conditions required in the cleaning of an animal slaughtered by slitting its throat are also required in slaughtering by piercing a spear into the throat of a camel. So the same conditions are required in a slaughterer slaughtering a camel by piercing a spear in its neck as are required for one slaughtering an animal by slitting its throat. So also the same conditions are required in the instrument of *Naḥr* as required in an instrument of *Dhabḥ*. Likewise, it is obligatory to

الذابح، و في آلة النحر ما اشترط في آلة الذبح، و تجب التسمية عنده كما تجب عند الذبح، و يجب الاستقبال بالمنحور، و في اعتبار الحياة و استقرارها هنا ما مر في الذبيحة.

مسألة ١٨ - يجوز نحر الابل قائمة و باركة مقبلة إلى القبلة، بل يجوز نحرها ساقطة على جنبها مع توجيه منحرها و مقاديم بدنها إلى القبلة و إن كان الأفضل كونها قائمة.

مسألة ١٩ - كل ما يتعذر ذبحه و نحره إما لاستعصائه أو لوقوعه في موضع لا يتمكن الانسان من الوصول إلى موضع ذكاته ليذبحه أو ينحره كما لو تردى في البئر أو وقع في مكان ضيق و خيف موته جاز أن يعقره بسيف أو سكين أو رمح أو غيرها مما يجرحه و يقتله، و يحل أكله و إن لم يصادف العقر موضع التذكية، و سقطت شرطية الذبح و النحر، و كذلك الاستقبال، نعم سائر الشرائط من التسمية و شرائط الذابح و الناحر تجب مراعاتها، و أما الآلة فيعتبر فيها ما مر في آلة الصيد الجمادية، و في الاجتزاء هنا بعقر الكلب وجهان، أقواهما ذلك في المستعصي، و منه الصائل المستعصي دون غيره كالمتردي.

مسألة ٢٠ - للذباحة و النحر آداب و وظائف مستحبة و مكروهة: فمنها- على ما حكي الفتوى به عن جماعة أن يربط يدي الغنم مع إحدى رجليه و يطلق الأخرى، و يمسك صوفه و شعره بيده حتى تبرد، و في البقر أن يعقل قوائمه الأربع، و يطلق ذنبه، و في الابل أن تكون قائمة و يربط يديها ما بين الخفين إلى الركبتين أو الابطين و يطلق رجليها، و في الطير أن يرسله بعد الذبح حتى يرفرف، و منها- أن يكون الذابح و الناحر مستقبل القبلة، ومنها- أن يعرض عليه الماء قبل الذبح و النحر، ومنها- أن يعامل مع الحيوان في الذبح و النحر و مقدماتهما ما هو الأسهل و الأروح و أبعد من التعذيب والايذاء له بان يساق إلى الذبح و النحر برفق و يضجعه برفق، و أن يحدد الشفرة، و توارى و تستر عنه حتى لا يراها، و أن يسرع في العمل و يمر السكين في المذبح بقوة.

utter Allah name in a *Naḥr* as in case of *Dhabḥ*. So also it is obligatory to make the animal being slaughtered by *Naḥr* face the Qiblah. So also there is the condition of the animal being alive at the time of slaughter and remain so until the process of *Naḥr* is completed as mentioned under an animal subjected to *Dhabḥ*.

Problem # 18. It is lawful to slaughter a camel by way of *Naḥr* whether it is in a standing or sitting posture and is facing the Qiblah. Rather it is allowed to slaughter it by way of *Naḥr* even if it is lying on one side with the part to be subjected to *Naḥr* and the fore parts of its body facing the Qiblah, though it is preferable [to slaughter it by way of *Naḥr*] in a standing posture.

Problem # 19. Every animal that is not possible to be slaughtered by slitting its throat or piercing a spear in its neck due to its recalcitrance or being situated in a place where it is not possible for any person to have access to the part of its body required to be slaughtered by way of *Dhabḥ* or *Naḥr* as when it falls into a well or in a narrow place and there is apprehension of its death, in such case it is allowed to wound it by a sword, knife or spear, etc., that may wound and kill it, and it is lawful to eat, even if the instrument does not reach the part of its body required to be slaughtered, and the conditions required in a *Dhabḥ* and *Naḥr* as well as facing the Qiblah shall drop. Of course, it shall be obligatory to fulfil the other conditions relating to the utterance of Allāh's name and those applicable to the person performing *Dhabḥ* or *Naḥr*. As regards the instrument of slaughter all the conditions mentioned under the instrument of iron or stone shall apply to it as well. As regards the sufficiency of wounding by a dog in such case, there are two alternatives, the stronger being in favour of its sufficiency. To the same category belongs an animal that assaults and has become recalcitrant, but not otherwise as one that falls into a well.

Problem # 20. There are some approved and disapproved etiquettes and duties relating to *Dhabḥ* and *Naḥr*. They include the following. According to the related verdict of a group of jurists one of the two legs of the animal must be fastened, leaving the other free, and one must hold its hair until it becomes cold [i.e.,lifeless]. In case of a cow all its four legs must be fastened, leaving its tail free. In case of a camel it must be in a standing posture and both of its fore legs from its hoofs to knees and armpits must be fastened and both of its hind legs must be left free. In case of a bird after slaughtering it, it must be left free to flutter. It is also approved that the person performing *Dhabḥ* or *Naḥr* must face Qiblah, and that before slaughtering the animal, it must be offered water. Before the slaughter and at the time of preparing for it the animal must be treated softly and gently and the process must be least painful and tortuous as possible, and it must be driven and laid on the ground gently. The knife must be sharpened but it must be kept away from the animal so that it may not see it. It is also approved to hasten the slaughtering act and pass the knife into the parts of the animal to be slaughtered forcefully.

As regards the disapproved ones, they include the following:

1. Skinning out the animal before its soul has departed, and it is said that it is forbidden, though the animal is not thereby rendered unlawful to eat, but it is more cautious [to avoid it].
2. Turning the knife and entering it under the throat and cutting it from above.
3. Slaughtering animal while another of its category be looking at it, though there is hesitation in case

و أما المكروهة فنها- أن يسلخ جلده قبل خروج الروح، و قيل بالحرمة و إن لم تحرم به الذبيحة، و هو أحوط. و منها- أن يقلب السكين و يدخلها تحت الحلقوم و يقطع إلى فوق، و منها- أن يذبح حيوان و حيوان آخر مجانس له ينظر إليه، و أما غيره ففيها تأمل و إن لا تخلو من وجه، ومنها- أن يذبح ليلاً و بالنهار قبل الزوال يوم الجمعة إلا مع الضرورة، ومنها- أن يذبح بيده ما ربّاه من النعم، و أما إبانة الرأس قبل خروج الروح منه فالأحوط تركها، بل الحرمة لا تخلو من وجه، نعم لا تحرم الذبيحة بفعلها على الأقوى، هذا مع التعمد، و أما مع الغفلة أو سبق السكين فلا حرمة و لا كراهة لا في الأكل و لا في الابانة بلا إشكال، و الأحوط ترك أن تنخع الذبيحة بمعنى إصابة السكين إلى نخاعها، وهو الخيط الأبيض وسط القفار الممتد من الرقبة إلى عجز الذنب.

مسألة ٢١ - لو خرج جنين أو أخرج من بطن أمه فمع حياة الام أو موتها بدون التذكية لم يحل أكله إلا إذا كان حياً و وقعت عليه التذكية و كذا إن خرج أو أخرج حياً من بطن أمه المذكاة، فانه لا يحل إلا بالتذكية فلو لم يذك لم يحل و ان كان عدمها من جهة عدم إتساع الزمان لها على الأقوى، و أما لو خرج أو أخرج ميتاً من بطن أمه المذكاة حل أكله و كانت تذكيته بتذكية أمه، لكن بشرط كونه تام الخلقة و قد أشعر أو أوبر و إلا فيتة، و لا فرق في حليته مع الشرط المزبور بين ما لم تلجه الروح و بين ما ولجته و مات في بطن أمه على الأقوى.

مسألة ٢٢ - لو كان الجنين حياً حال إيقاع الذبح أو النحر على أمه و مات بعده قبل أن يشق بطنها و يستخرج منها حل على الأقوى لو بادر على شق بطنها و لم يدرك حياته، بل ولو لم يبادر و لم يؤخر زائد على القدر المتعارف في شق بطون الذبائح بعد الذبح، و إن كان الأحوط المبادرة و عدم التأخير حتى بالقدر المتعارف، ولو أخر زائداً عن المتعارف و مات قبل أن يشق البطن فالأحوط الاجتناب عنه.

the other animal belongs to some other category, though it is also preferable to avoid it in that case as well.

4. Slaughtering the animal at night or during the day before noon on Friday, except when needed.

5. Slaughtering animal reared by oneself. As regards cutting the head before the departure of the animal's soul, according to the more cautious opinion, it must be avoided. Rather it also considered forbidden.

Of course, according to the stronger opinion, the slaughtered animal is not thereby rendered unlawful to eat. This is the case when it is done deliberately.

In case, however, it is done due to negligence or due to sharpness of the knife, there shall be no disapproval or objection in eating it or cutting off its head. According to the more cautious opinion, the knife must not reach the spinal marrow, and that is a white thread in the middle of the spinal chord extending from the neck to the rump of the tail.

Problem # 21. If a foetus comes out or is taken out of the stomach of its mother animal, it is not lawful to eat it except when it is alive and it has been duly slaughtered during the life of its mother or after its death.

The same shall be the case if it comes out or is taken out of the stomach of its mother that has been duly slaughtered, it shall not be lawful to eat except by duly slaughtering it, so that if it is not duly slaughtered, according to the stronger opinion, it shall not be lawful to eat even if the non-performance of the due slaughter insufficiency of time for its performance. If, however, it has come out or taken out of the stomach of its mother that is duly slaughtered, it shall be lawful to eat it, and the slaughter of its mother shall be treated as its slaughter, but with the condition that it must be complete in creation and hair or fur must have grown on it; otherwise, it shall be treated as dead. According to the stronger opinion, in view of the above condition, there is no difference in its lawfulness to eat whether soul has not entered its body or it has entered but it died in the stomach of its mother.

Problem # 22. If the foetus was alive at the time of slaughtering its mother by way of *Dhabḥ* or *Nahr* , but died after it before the stomach of its mother was ripped and it was taken out, according to the stronger opinion, it shall be lawful to eat if they have hastened in ripping the stomach of its mother, and it was not found alive. Rather, [the same shall be the case], even if they have not hastened in ripping the stomach of its mother, but have not delayed it inordinately, the delay being more than it is usual in ripping the stomach of the slaughtered animals after they have been slaughtered, though, it is more cautious to hasten the ripping of the stomach of the mother animal without delaying it more than the usual time. If it has been delayed more than the usual time and the foetus dies before ripping the stomach of its mother, then it is more cautious to abstain [from eating it].

Problem # 23. There is no objection in purging an animal the meat of which is essentially lawful to eat but has been prohibited due to some accidental cause as eating feces or having been subjected to sexual intercourse [by a man], regardless whether it one living in the sea or land, whether it is wild or domestic, one flying or otherwise, though it may differ in the process of purging as has already been mentioned. As a result of purging, its meat and hide are rendered clean and its meat is rendered lawful,

مسألة ٢٣ - لا إشكال في وقوع التذكية على كل حيوان حل أكله ذاتاً و ان حرم بالعارض كالجلال و الموطوء بحرياً كان أو برياً، وحشياً كان او أنسياً، طيراً كان أو غيره و ان اختلف في كيفية التذكية على ما مر، و أثر التذكية فيها طهارة لحمها و جلدها و حلية لحمها لو لم يحرم بالعارض، و أما غير المأكول من الحيوان فما ليس له نفس سائلة لا أثر للتذكية فيه لامن حيث الطهارة و لا من حيث الحلية، لأنه طاهر و محرم أكله على كل حال، و ما كان له نفس سائلة فان كان نجس العين كالكلب و الخنزير فليس قابلاً للتذكية، و كذا المسوخ غير السباع كالفيل و الدب و القرد و نحوها، و كذا الحشرات، و هي الدواب الصغار التي تسكن باطن الأرض كالفارة و ابن عرس و الضب و نحوها على الأحوط الذي لا يترك فيها و ان كانت الطهارة لا تخلو من وجه، و أما السباع و هي ما تفترس الحيوان و تأكل اللحم سواء كانت من الوحوش كالأسد و النمر والفهد و الثعلب و ابن آوى و غيرها أو من الطيور كالصقر و البازي و الباشق و غيرها فالأقوى قبولها للتذكية، و بها تطهر لحومها و جلودها، فيحل الانتفاع بها بأن تلبس في غير الصلاة و يفترش بها، بل بأن تجعل وعاءً للمائعات كأن تجعل قربة ماء أو عكة سمن أو دبة دهن و نحوها و إن لم تدبغ على الأقوى، و إن كان الأحوط أن لا تستعمل ما لم تكن مدبوغة.

مسألة ٢٤ - الظاهر أن جميع أنواع الحيوان المحرم الأكل مما كانت له نفس سائلة غير ما ذكر آنفاً تقع عليها التذكية، فتطهر بها لحومها و جلودها.

مسألة ٢٥ - تذكية جميع ما يقبل التذكية من الحيوان المحرم الأكل انما تكون بالذبح مع الشرائط المعتبرة في ذبح الحيوان المحلل، و كذا بالاصطياد بالآلة الجمادية في خصوص الممتنع منها كالمحلل، وفي تذكيتها بالاصطياد بالكلب المعلم تردد و إشكال.

مسألة ٢٦ - ما كان بيد المسلم من اللحوم و الشحوم و الجلود إذا لم يعلم كونها من غير المذكى يؤخذ منه و يعامل معه معاملة المذكى بشرط تصرف ذي

though due to some accidental cause it may have been declared unlawful.

As far as the animals the meat of which is not lawful to eat, in case of those not having spurting blood, purging them shall have no effect in their cleanness or lawfulness [of their meat], as they are clean but in all circumstances it is not lawful to eat their meat. As regards the animals having spurting blood, those that are by nature unclean like a dog or a pig, they are not capable of being purged. The same is the case with the deformed animals that are not beasts like an elephant, a bear, a monkey, or the like.

Likewise, the same rule applies to the insects that are small animals that live under the earth like mice, mongoose, lizards and the like, it is more cautious not to give up caution in case of the two, even if their cleanness is not free from significance.

As regards the beasts that devour animals and eat their meat, irrespective of their being wild like a lion, a tiger, a leopard, a fox, a jackal, etc., or birds like hawks, falcons, sparrow hawks, etc., according to the stronger opinion, they are capable of being purged, as a result of which their meat and skin are rendered clean, and it is lawful to use their skin as wearing the garment made of it except while praying or may be used to lay on the floor, or they may be used for making water-skin or containers of oil and fat, and the like, even if they are not tanned, though it is more cautious not to use them unless they are tanned.

Problem # 24. Apparently all the types of animals meat of which is not lawful to eat, out of them those having spurting blood, not mentioned before, are capable of being purged, and thereby their meat and skin are rendered clean.

Problem # 25. Purging of all the animals capable of being purged meat of which is not lawful to eat takes place by slaughtering them according to the conditions required for slaughtering animals meat of which is lawful to eat. Likewise, their purging can be done through hunting with an instrument of iron or stone in case of their recalcitrance as the animals whose meat is lawful to eat. As regards their purging by hunting with the help of a dog, there is hesitation and objection.

Problem # 26. The meat, fats or skins in the possession of a Muslim can be accepted from him unless it is known that they are not purged, and they are to be treated as purged ones provided that, according to the more cautious opinion, the possession of the possessor must be one where there is a condition of purging. In such conditions, it is lawful to sell, purchase, eat or use them while praying or make any use in which there is a condition of purging them, and it is not obligatory on the person using them to question or enquire about them. It is not approved, rather it is forbidden to do so.

اليد فيه تصرفاً مشروطاً بالتذكية على الأحوط، فحينئذ يجوز بيعه و شراؤه و أكله و استصحابه في الصلاة و سائر الاستعمالات المتوقفة على التذكية و لا يجب عليه الفحص و السؤال، بل و لا يستحب بل نهي عنه، و كذلك ما يباع منها في سوق المسلمين سواء كان بيد المسلم أو مجهول الحال، بل و كذا ما كان مطروحاً في أرضهم إذا كان فيه أثر الاستعمال كما إذا كان اللحم مطبوخاً و الجلد مخيطاً أو مدبوغاً، و كذا إذا أخذ من الكافر و علم كونه مسبوقاً بيد المسلم على الأقوى بشرط مراعاة الاحتياط المتقدم، و أما ما يؤخذ من يد الكافر ولو في بلاد المسلمين و لم يعلم كونه مسبوقاً بيد المسلم و ما كان بيد مجهول الحال في بلاد الكفار أو كان مطروحاً في أرضهم و لم يعلم أنه مسبوق بيد المسلم و استعماله يعامل معه معاملة غير المذكى، و هو بحكم الميتة، و المدار في كون البلد أو الأرض منسوباً إلى المسلمين غلبة السكان و القاطنين بحيث ينسب عرفاً إليهم ولو كانوا تحت سلطة الكفار، كما أن هذا هو المدار في بلد الكفار، ولو تساوت النسبة من جهة عدم الغلبة فحكمه حكم بلد الكفار.

مسألة ٢٧ ـ لا فرق في إباحة ما يؤخذ من يد المسلم بين كونه مؤمناً أو مخالفاً يعتقد طهارة جلد الميتة بالدبغ و يستحل ذبائح أهل الكتاب و لا يراعي الشروط التي اعتبرناها في التذكية، و كذا لا فرق بين كون الآخذ موافقاً مع المأخوذ منه في شرائط التذكية اجتهاداً أو تقليداً أو مخالفاً معه فيها إذا احتمل الآخذ تذكيته على وفق مذهبه كما إذا اعتقد الآخذ لزوم التسمية بالعربية دون المأخوذ منه إذا احتمل أن ما بيده قد روعي فيه ذلك و إن لم يلزم رعايته عنده.

والله العالم.

The same shall be the case if these things are being sold in a market of the Muslims, regardless whether they are in the possession of a Muslim or one whose position is not known. The same shall be the case if one finds them lying in the land of Muslims if there is some sign of having been used, as when the meat is cooked and the skin is stitched or tanned. Similarly, according to the stronger opinion, if one gets them from an infidel but knows that they had been in the possession of a Muslim,[the same shall be the rule], provided caution has been taken earlier.

As regards the things taken from the possession of an infidel, even if in a place of Muslims, without there being any knowledge that they had been in the possession of a Muslim, nor were they in the possession of one whose position is not known in a place of infidels or were lying their land, without there being any knowledge that they had been in the possession of a Muslim, they shall be used as things that are not purged, and treated as dead. The criterion for the place or land being attributed to Muslims is the majority of their inhabitants and residents so that they are usually attributed to them, even they are ruled by infidels, in the same way as it shall also be the criterion for the place of infidels. If the number of the Muslim and infidel inhabitants is equal, it shall be treated as a place of infidels.

Problem # 27. There shall be no difference in the lawfulness what is obtained from a Muslim whether he is a Mu'min (or a Shī'ah) or belonging to the opposite sect 9 or a Sunnī) believing in the cleanness of skin of a dead animal by tanning. The animals slaughtered by the *Ahl al-Kitāb* shall be considered lawful without the need of fulfilling the conditions we have mentioned under purging them. Likewise, there shall be no difference whether the person obtaining these things agrees with the person from whom they are obtained as regards the conditions of *Ijtihād* or *Taqlīd*, or differs from him in this respect, while there is likelihood of the one obtaining the things having purged the animal according to his belief, as when the person obtaining them believes in uttering Allāh's name in Arabic contrary to the person from whom he has obtained them, when there is likelihood that the person possessing them would have fulfilled the conditions accordingly, even if he does not consider them necessary according to his own belief. Anyhow, Allāh knows [everything].

كتاب الأطعمة والأشربة

والمقصود من هذا الكتاب بيان المحلل والمحرم من الحيوان و غير الحيوان.

القول في الحيوان

مسألة ١ ـ لا يؤكل من حيوان البحر إلا السمك و الطير في الجملة، فيحرم غيره من أنواع حيوانه حتى ما يؤكل مثله في البر كبقره على الأقوى.

مسألة ٢ ـ لا يؤكل من السمك إلا ما كان له فلس و قشور بالأصل و إن لم تبق وزالت بالعارض كالكنعت، فانه على ما ورد فيه حوت سيئة الخلق تحتك بكل شيء فيذهب فلسها، و لذا لو نظرت إلى أصل أذنها وجدته فيه، و لا فرق بين أقسام السمك ذي القشور، فيحل جميعها صغيرها و كبيرها من البز و البني و الشبوط و القطان و الطيرامي و الابلامي وغيرها، و لا يؤكل منه ما ليس له فلس في الأصل كالجري و الزمار و الزهو و المارماهي و غيرها.

مسألة ٣ ـ الأربيان المسمى في لسان أهل هذا الزمان بالروبيان من جنس السمك الذي له فلس، فيجوز أكله.

مسألة ٤ ـ بيض السمك يتبعه، فبيض المحلل حلال و إن كان أملس و بيض

SECTION THIRTY-FOUR

EATABLES (*AṬ' IMAH*) & DRINKS (*ASHRIBAH*)

The purpose of this Section is the discussion about the lawfulness and unlawfulness of the animals and other things.

Chapter One - Concerning the Animals

Problem # 1. From among the sea animals, it is lawful to eat fish and some birds, while, according to the stronger opinion, the rest are forbidden to eat, including even those animals the like of which living on land are prohibited as the sea-cow.

Problem # 2. Of the fish only those are lawful to eat that originally have scales and shells, even f their scales and shells are no more there due to some accidental cause as the fish called *Kan'ath*, about which it has been related that it is a fish of bad nature that loses its scales whenever it strikes against anything. So if one looks under its original ears, one may find the scales there. There is no difference in the lawfulness of different varieties of fish having shells. They are all lawful whether small or big including the *Buzz, Banī, Shabbūṭ* (kind of large fish found in the Euphrates and Tigris rivers),*Qaṭṭān,Ṭayrāmī,Ablāmī*,etc. The fish having originally no scales is not unlawful to eat as *Jarī* (a long fish found in rivers), *Zammār, Zahū* (a fish having thorns), or eel, etc.

Problem # 3. Shrimps or prawns, known as *Rūbiyān* in the language of the people of this age, belong to the kind of fish having scales, and so it is lawful to eat them.

Problem # 4. The egg of a fish is governed by the same rules as fish. So the eggs of fish lawful to eat are lawful, even if they are soft, while those unlawful to eat are forbidden, even if they are hard. cautious, in case they are fish they must not be eaten. Of course, in case there is doubt about their lawfulness or unlawfulness, while they are hard, they too are lawful to eat.

Problem # 5. The animals living on land are of two kinds, namely, wild and tame. As regards the tame animals, all their kinds are lawful to eat, as the sheep and goats, cows and buffaloes and camels, but it

المحرم حرام و إن كان خشناً، و الأحوط في حال الاشتباه عدم أكل ما كان أملس، نعم لو كان مشتبهاً في أنه من المحلل و المحرم و كان خشناً أو اشتبه ذلك أيضاً حل أكله.

مسألة ٥ - البهائم البرية من الحيوان صنفان أنسية و وحشية، أما الأنسية فيحل منها جميع أصناف الغنم و البقر و الابل، و يكره الخيل و البغال و الحمير، و أخفها كراهة الأول، و تحرم منها غير ذلك كالكلب و السنور و غير هما، و أما الوحشية فتحل منها الظبي و الغزلان و البقر و الكباش الجبلية و اليحمور والحمير الوحشية، و تحرم منها السباع، و هي ما كان مفترساً و له ظفر و ناب قو ياً كان كالأسد و النمر والفهد و الذئب أو ضعيفاً كالثعلب و الضبع و ابن آوى، و كذا يحرم الارنب و إن لم يكن من السباع، و كذا تحرم الحشرات كلها كالحية و الفأرة و الضب و اليربوع و القنفذ و الصراصر و الجعل والبراغيث والقمل وغيرها مما لا تحصى، و كذا تحرم المسوخ كالفيل و القردة و الدب و غيرها.

مسألة ٦ - يحل من الطير الحمام بجميع أصنافه كالقماري و هو الأزرق و الدباسي و هو الأحمر، و الورشان و هو الأبيض، و الدراج و القبج و القطا والطيهوج والبط و الكروان والحبارى و الكركي والدجاج بجميع أقسامه، و العصفور بجميع أنواعه، و منه البلبل و الزرزور و القبرة و هي التي على رأسها القزعة، و يكره منه الهدهد و الخطاف و هو الذي يأوى البيوت و آنس الطيور بالناس و الصرد، و هو طائر ضخم الرأس و النقار يصيد العصافير أبقع نصفه أسود و نصفه أبيض، و الصوام و هو طائر أغبر اللون طو يل الرقبة أكثر ما يبيت في النخل، و الشقراق و هو طائر أخضر مليح بقدر الحمام، خضرته حسنة مشبعة، في أجنحته سواد، و يكون مخططاً بحمرة و خضرة و سواد، و لا يحرم شيء منها حتى الخطاف على الأقوى، و يحرم منه الخفاش و الطاووس و كل ذي مخلب، سواء كان قو ياً يقوى به على افتراس الطير كالبازي و الصقر و العقاب و الشاهين و الباشق أو ضعيفاً لا يقوى به على ذلك كالنسر و البغاث.

is disapproved to eat horses, mules and donkeys, the former being the least disapproved.

The animals other than these are unlawful to eat as dogs, cats, etc.

As regards the wild animals, from among them deer, stags, wild cows, mountain rams, roebucks and wild ass.

Of the wild animals, the beasts are forbidden. They are those who devour other animals and have sharp nails and teeth and those that are strong are a lion, a tiger, a leopard and a wolf, while those who are weak are the fox, hyena and jackal.

Likewise, a rabbit is also forbidden to eat, though it is not among the beasts. So also, all the insects are forbidden to eat, as snakes, mice, lizards, jerboas, hedgehogs, cockroaches, dung beetles, fleas, lice, etc. that are innumerable.

Similarly, the animals that are deformed are forbidden to eat as elephants, monkeys, bears, etc.

Problem # 6. From among the birds, the pigeons with their kinds like turtle-doves that are of blue colour, *Dabāsī* that are of red colour, *Varshān* that are of white colour, francolins, kind of partritges, sand grouses, dull yellow partritges, ducks, varieties of plovers, bustards, crane, fowls of all kinds, sparrows of all kinds including nightingales, starlings, larks having a tuft of hair on its head are allowed to eat.

The following birds are disapproved to eat, namely, the hoopoes, *Khuṭṭāf*, a variety of swallows that live in the houses and become intimate with human beings, *Ṣard,* a bird of big head and beak hunting sparrows, with half black and half white speckles, *Ṣavām*, a dust-coloured bird with a long neck mostly lives on date palms, *Shaqrāq* a green-coloured, pretty bird equal to a pigeon in size, its green colour is extremely beautiful, having black wings with red, green and black stripes.

According to the stronger opinion, of these birds none is unlawful including even *Khuṭṭāf.*

The following birds are, however, forbidden to eat, namely, a bat, a pea-cock and all birds having claws, irrespective of their being strong enough to tear their prey as a hawk, falcon, eagle, the Indian falcon, sparrow hawk, or weak not strong enough to tear its prey as a vulture or a B*ughāth*, a greenish bird smaller than a vulture and slow in flying.

Problem # 7. It is more cautious to abstain from [eating] crows of any kind including the farm crow and the raven that is smaller than the farm crow, having dust-colour like ashes. It is emphatically cautious to avoid eating the speckled one of black and white colour, called "Aq'aq" , and the big one of black colour that lives in the mountains. Both of them eat filth, and there is strong likelihood of their being among the beastly birds. So their prohibition becomes even stronger. Rather the prohibition of all crows

مسألة ٧ ـ الأحوط التنزه و الاجتناب عن الغراب بجميع أقسامه حتى الزاغ، و هو غراب الزرع، و الغداف الذي هو أصغر منه أغبر اللون كالرماد، و يتأكد الاحتياط في الأبقع الذي فيه سواد و بياض، و يقال له: العقعق، والأسود الكبير الذي يسكن الجبال، و هما يأكلان الجيف و يحتمل قوياً كونهما من سباع الطير، فتقوى فيهما الحرمة، بل الحرمة في مطلق الغراب لا تخلو من قرب.

مسألة ٨ ـ يميّز محلل الطير عن محرمه بأمرين، جعل كل منهما في الشرع علامة للحل و الحرمة فيما لم ينص على حليّته ولاعلى حرمته، دون مانص فيه على حكمه من حيث الحل و الحرمة كالأنواع المتقدمة أحدهما الصفيف و الدفيف، فكل ما كان صفيفه ـ و هو بسط جناحيه عند الطيران ـ أكثر من دفيفه ـ و هو تحريكهما عنده ـ فهو حرام، و ما كان بالعكس بأن كان دفيفه أكثر فهو حلال، ثانيهما الحوصلة و القانصة و الصيصية، فما كان فيه أحد هذه الثلاثة فهو حلال، و ما لم يكن فيه شيء منها فهو حرام، و الحوصلة ما يجتمع فيه الحب و غيره من المأكول عند الحلق، و القانصة قطعة صلبة تجتمع فيها الحصاة الدقاق التي يأكلها الطير، و الصيصية هي الشوكة التي في رجل الطير موضع العقب، و يتساوى طير الماء مع غيره في العلامتين المزبورتين، فما كان دفيفه أكثر من صفيفه أو كان فيه أحد الثلاثة فهو حلال و إن كان يأكل السمك، و ما كان صفيفه أكثر من دفيفه أو لم يوجد فيه شيء من الثلاثة فهو حرام.

مسألة ٩ ـ لو تعارضت العلامتان كما إذا كان ما صفيفه أكثر من دفيفه ذا حوصلة أو قانصة أو صيصية أو كان ما دفيفه أكثر من صفيفه فاقداً للثلاثة فالظاهر أن الاعتبار بالصفيف و الدفيف، فيحرم الأول و يحل الثاني على إشكال في الثاني، فلا يترك الاحتياط و إن كان الحلّ أقرب، لكن ربما قيل بالتلازم بين العلامتين و عدم وقوع التعارض بينهما، فلا إشكال.

مسألة ١٠ ـ لو رأى طيراً يطير و له صفيف و دفيف و لم يتبين أيهما أكثر تعين له الرجوع الى العلامة الثانية، و هي وجود أحد الثلاثة وعدمها و كذا إذا وجد

is not devoid of being close to the traditional authority.

Problem # 8. A lawful bird is distinguished from an unlawful one in two ways. Both of them are signs of lawfulness ort unlawfulness where there is no clear authority in the law in respect of their lawfulness or unlawfulness excluding those for whose lawfulness or unlawfulness like the ones already mentioned. They are birds expanding its wings and fluttering its wings. So a bird that before flying expands its wings more that fluttering is forbidden, while if it is otherwise, it shall be lawful.

The other distinctive sign is the bladder, gizzard and spur of the rooster. Bladder is the pocket in which is stored the grain, etc. of food near the throat. Gizzard is a solid piece in which are stored the pieces of stones eaten by the bird. Spur is the sharp, had projection on the back of a cock's leg.

The birds living on land or sea are equal in the two signs mentioned. If in a bird there is more fluttering the wings than expanding them or one of the signs mentioned here, it shall be lawful to eat, even if it eats fish. If it expands its wings more than fluttering them, or has none of the signs mentioned here, it shall be unlawful.

Problem # 9. If there is a conflict in both the sets of signs, as when a bid expands its wings more than fluttering them, but at the same time has a bladder, gizzard or spur, or it is one fluttering its wings more than expanding them but has none of the three things, then apparently the criterion shall be its expanding and fluttering wings, so the first type shall be unlawful while the latter shall be lawful though there shall be some hesitation in case of the latter, and so caution must not be given up, though its lawfulness shall be closer to traditional authority.

Some jurists are of the opinion that both the set of signs are essential and there should be no conflict between them, in which case there shall be no hesitation.

Problem # 10. If one sees a bird flying, and it has both expanding and fluttering the wings, and it is not clear which of the two signs is more than the other. In such case reference shall be made to the second set of signs, as to their existence or absence in the bird.

The same rule shall apply if one finds a bird duly slaughtered and is ignorant of its actual position. If he does not know its position at all, it shall be lawful to eat.

Problem # 11. If, suppose, the expanding and fluttering of wings is equal in a bird, it shall be more cautious to refer to the other set of signs. If one is ignorant of the knowledge about those signs too, then, according to the opinion closer to traditional authority, it shall be lawful to eat it.

طيراً مذبوحاً لم يعرف حاله، و لو لم يعرف حاله مطلقا فالأقرب الحل.

مسألة ١١ - لو فرض تساوي الصفيف و الدفيف فالأحوط أن يرجع الى العلامة الثانية، و مع عدم معرفة الثانية فالأقرب الحل.

مسألة ١٢ - بيض الطيور تابع لها في الحل و الحرمة، فبيض المحلل حلال و المحرم حرام، و ما اشتبه أنه من أيها يؤكل ما اختلف طرفاه و تميّز رأسه من تحته مثل بيض الدجاج دون ما اتفق و تساوى طرفاه.

مسألة ١٣ - النعامة من الطيور، و هي حلال لحماً و بيضاً على الأقوى.

مسألة ١٤ - اللقلق لم ينصّ على حرمته و لا على حليته، فليرجع الى العلامات، و الظاهر أن صفيفه أكثر، فهو حرام، و من لم يحرز له ذلك يرجع الى العلامة الثانية.

مسألة ١٥ - تعرض الحرمة على الحيوان المحلل بالأصل من أمور: منها- الجلل، و هو أن تيغذى الحيوان عذرة الانسان بحيث يصدق عرفاً أنها غذاؤه، و لا يلحق بها عذرة غيره و لا سائر النجاسات، و يتحقق صدق المزبور بانحصار غذائه بها، فلو كان تيغذى بها مع غيرها لم يتحقق الصدق، فلم يحرم إلا أن يكون تغذيه بغيرها نادراً جداً بحيث يكون بأنظار العرف بحكم العدم، و بأن يكون تغذيه بها مدة معتداً بها، و الظاهر عدم كفاية يوم و ليلة، بل يشك صدقه بأقل من يومين بل ثلاثة.

مسألة ١٦-يعم حكم الجلل كل حيوان محلل حتى الطير و السمك

مسألة ١٧ - كما يحرم لحم الحيوان بالجلل يحرم لبنه و بيضه و يحلان بما يحل به لحمه، و بالجملة هذا الحيوان المحرم بالعارض كالحيوان المحرّم بالأصل في جميع الأحكام قبل أن يستبرأ و يزول حكمه، نعم الحكم في بعض أفراد الكلية مبني على الاحتياط.

مسألة ١٨ - الظاهر أن الجلل ليس مانعاً عن التذكية، فيذكى الجلال بما يذكى به غيره، و يترتب عليها طهارة لحمه وجلده كسائر الحيوانات المحرمة

Problem # 12. The eggs of bird follow them in their lawfulness and unlawfulness. So the eggs of the lawful birds are lawful, while those of the unlawful birds are unlawful. If there is doubt as to their being lawful or unlawful, the eggs the upward and lower sides of which can be distinguished like the eggs of a hen excluding those both sides of which are the same and equal.

Problem # 13. An ostrich belongs to the family of birds, and, according to the stronger opinion, its meat and eggs are lawful to eat.

Problem # 14. There is no textual authority as to the lawfulness or unlawful of cranes. So reference must be made to the set of signs mentioned. Apparently it expands its wings more than fluttering them, and so it is unlawful. If this sign is not clear to any person, he must refer to the other set of signs [to decide the matter].

Problem # 15. The following reasons render an originally lawful animal unlawful. One of them is that it should be eating human dung in a way that it may be said usually that it is its food, and it should not include the excrete of other than human beings or other filths, and it shall apply only when the human dung is its sole food, so that if it eats human dung along with other things, the rule shall not apply to it. It shall not be forbidden except when it eats things other than human dung very rarely so that in the eyes of the people it may be considered negligent, so that it may have eaten that other thing for a short while. Apparently a period of a day and night shall not be sufficient [to consider one eating human dung]. Rather there is doubt in its confirmation if the period is less than two days, rather three days.

Problem # 16. The rule of an animal eating human dung is applied to all lawful animals including even birds and fish.

Problem # 17. As is rendered unlawful the meat of an animal, so is rendered its milk and eggs. So also what renders the milk and eggs of an animal lawful, it also renders its meat lawful. In short, such an animal that is rendered unlawful temporarily due to some cause is like one that is originally unlawful in the application of all relevant rules before it is cleaned and is exonerated from the application those rules. Of course, in case of some of them the basis of the rules is caution.

Problem # 18. Apparently eating of human dung by an animal is not an obstacle in its cleaning. So an animal eating human dung is cleaned by what an animal other than it is cleaned, and the cleanness of its meat and skin is applied to it like other originally unlawful animals that are capable of being cleaned.

Problem # 19. The unlawfulness of an animal eating human dung is removed by its cleaning [*Istibrā'*] through its giving up eating human dung and eating some thing other than the human dung, until it is no more called an animal eating human dung. Caution is not given up in the removal of the animal being called an animal eating human dung by the passage of the period prescribed for each category of animals.

بالأصل القابلة للتذكية.

مسألة ١٩ ـ تزول حرمة الجلال بالاستبراء بترك التغذي بالعذرة و التغذي بغيرها حتى يزول عنه اسم الجلل، و لا يترك الاحتياط مع زوال الاسم بمضي المدة المنصوصة في كل حيوان، و هي في الابل أربعون يوماً، و في البقر عشرون يوما، و الأحوط ثلاثون، و في الغنم عشرة أيام، و في البطة خمسة أيام، وفي الدجاجة ثلاثة أيام، و في السمك يوم و ليلة، و في غير ما ذكر المدار هو زوال اسم الجلل بحيث لم يصدق أنه يتغذى بالعذرة، بل صدق أن غذاءه غيرها.

مسألة ٢٠ ـ كيفية الاستبراء أن يمنع الحيوان بربط أو حبس عن التغذي بالعذرة في المدة المقررة، و يعلف في تلك المدة علفاً طاهراً على الأحوط و إن كان الاكتفاء بغير ما أوجب الجلل مطلقاً و إن كان متنجساً أو نجساً لا يخلو من قوة، خصوصاً في المتنجس.

مسألة ٢١ ـ يستحب ربط الدجاجة التي يراد أكلها أياماً ثم ذبحها ان لم يعلم جللها.

مسألة ٢٢ ـ ممّا يوجب حرمة الحيوان المحلل بالأصل أن يطأه الانسان قبلاً أو دبراً و إن لم ينزل، صغيراً كان الواطيء أو كبيراً، عالماً كان أو جاهلاً، مختاراً كان أو مكرهاً، فحلاً كان الموطوء أو أنثى، فيحرم بذلك لحمه ولحم نسله المتجدد بعد الوطء على الأقوى في نسل الأنثى و على الأحوط في نسل الذكر، و كذا لبنها و صوفها و شعرهما، والظاهر أن الحكم مختص بالبهيمة و لا يجري في وطء سائر الحيوانات لا فيها و لا في نسلها.

مسألة ٢٣ ـ الحيوان الموطوء إن كان ممّا يراد أكله كالشاة و البقرة و الناقة يجب أن يذبح ثم يحرق و يغرم الواطيء قيمته لمالكه إن كان غير المالك، و إن كان مما يراد ظهره حملاً أو ركوباً و ليس يعتاد أكله كالحمار و البغل و الفرس أخرج من المحل الذي فعل به الى بلد آخر فيباع فيه، فيعطى ثمنه للواطيء، و يغرم قيمته إن كان غير المالك.

So in case of camels it is forty days, while in case of a cow it is twenty days, the more cautious being thirty days. In case of sheep and goats it is ten days, while for a duck it is five days. In case of a fowl it is three days, while for a fish it is a day and night. In case of others the criterion is the removal of its being called an animal eating human dung, and it is confirmed that its food is other than human dung.

Problem # 20. The process of cleaning [*Istibrā'*] is that the animal must be stopped from eating human dung for the prescribed period by fastening or confining it, and, according to the more cautious opinion, it is fed on clean food, although its sufficiency shall not be devoid of the force if it is fed any thing other than what may cause it being called an animal eating human dung, even if it was something that has been rendered unclean due to contacting an unclean object or an object that is unclean by itself, particularly an object rendered unclean due to contacting an unclean object.

Problem # 21. If one wants to eat a fowl, it is approved to confine it for a few days and then slaughter it, when it is known that it eats human dung.

Problem # 22. Among the causes rendering an originally lawful animal unlawful is the sexual intercourse of a man with it in the natural or unnatural way, even without the discharge of semen, regardless whether the performer of the intercourse is a minor or an adult, having knowledge of the illegality of the act or ignorant, having free will or being forced, the animal with which the act is done is male or female. So, according to the stronger opinion, the act renders its meat and the meat of its offspring born after the sexual act unlawful as regards the female offspring, and, according to the more cautious opinion, even the male offspring. The same rule applies to their milk, fur or hair. Apparently the rule applies exclusively to the quadruped animals, and it is not applied to other animals themselves or their offspring.

Problem # 23. An animal with which sexual intercourse has been committed by a man, if it is one with which is meant for eating as a sheep or goat, a cow or a she-camel, it is obligatory to slaughter it and then burn it, the perpetrator compensating its price to the owner if he is one other than its owner.

If, however, the animal belongs to the category meant for riding or loading and is not usually eaten like a donkey, a mule or a horse, it shall be carried away from the place where it was sexually abused and sold there, and its price shall be paid to the perpetrator of the act, paying its compensation to its master if the perpetrator was other than its master.

Problem # 24. Another cause that renders a lawful animal unlawful is when its young of a cow, sheep or goat is suckled on the milk of a she-pig until it leads to its gaining strength and the growth of its meat and hardening of its bones, as a result of which its meat and milk as well as that of its offspring are rendered unlawful. However, to a she-pig is not associated a bitch or an infidel woman.

مسألة ٢٤ ـ مما يوجب عروض الحرمة على الحيوان المحلّل بالأصل أن يرضع حمل أو جدي أو عجل من لبن خنزيرة حتى قوي و نبت لحمه و اشتد عظمه، فيحرم لحمه و لحم نسله و لبنهما، و لا تلحق بالخنزيرة الكلبة و لا الكافرة، و في تعميم الحكم للشرب من دون رضاع و للرّضاع بعد ما كبر و فطم إشكال و إن كان أحوط، و إن لم يشتد كره لحمه، و تزول الكراهة بالاستبراء سبعة أيام بأن يمنع عن التغذي بلبن الخنزيرة و يعلف إن استغنى عن اللبن، و إن لم يستغن عنه يلقى على ضرع شاة مثلاً في تلك المدة.

مسألة ٢٥ ـ لو شرب الحيوان المحلل الخمر حتى سكر و ذبح في تلك الحالة يؤكل لحمه لكن بعد غسله على الأحوط، و لا يؤكل ما في جوفه من الأمعاء و الكرش و القلب و الكبد و غيرها و إن غسل، ولو شرب بولاً ثم ذبح عقيب الشرب حل لحمه بلا غسل، و يؤكل ما في جوفه بعد ما يغسل.

مسألة ٢٦ ـ لو رضع جدي أو عناق أو عجل من لبن امرأة حتى فطم و كبر لم يحرم لحمه لكنه مكروه.

مسألة ٢٧ ـ يحرم من الحيوان المحلل أربعة عشر شيئاً: الدم و الروث و الطحال و القضيب و الفرج ظاهره و باطنه، و الأنثيان و المثانة و المرارة و النخاع و هو خيط أبيض كالمخ في وسط فقار الظهر، و الغدد، و هي كل عقدة في الجسد مدورة يشبه البندق في الأغلب، و المشيمة، وهي موضع الولد، و يجب الاحتياط عن قرينه الذي يخرج معه، و العلباوان، و هما عصبتان عريضتان صفراوان ممتدتان على الظهر من الرقبة الى الذنب، و خرزة الدماغ، و هي حبّة في وسط الدماغ بقدر الحمصة تميل الى الغبرة في الجملة يخالف لونها لون المخّ الذي في الجمجمة، و الحدقة، و هي الحبة الناظرة من العين لا جسم العين كلّه.

مسألة ٢٨ ـ تختص حرمة الأشياء المذكورة بالذبيحة و المنحورة، فلا يحرم من السمك والجراد شيء منها ما عدا الرجيع و الدم على إشكال فيهما.

In the generalisation of the rule there is hesitation when the milk is drunk without being suckled, or when it is suckled after the young of the animal has grown old and has been weaned, though it would be more cautious [to abstain from its meat and milk]. If its bones have not grown hard [as a result of being suckled on the milk of a she-pig], it would be disapproved to eat its meat. The disapproval is removed by *Istibrā'* of seven days, so that it is kept away from being suckled on the milk of the she-pig [for seven days] and is fed on grass if it does not depend on milk. If it is not weaned, it may be suckled through the udder of, for example, a sheep during the said period.

Problem # 25. If an animal the of which is lawful drinks wine until it gets drunk, and is slaughtered in that condition, its meat may be eaten, but, according to the more cautious opinion after the meat is duly washed. However, its inner parts like the entrails, paunch, heart and liver, etc. shall not be eaten even if they are duly washed.

If such an animal drinks urine, and is then slaughtered after it has drunk the urine, its meat shall be lawful to eat even without washing it, but its internal parts of body may be eaten after duly washing them.

Problem # 26. If the young of a cow or sheep or goat is suckled on the milk of a woman until it is weaned and grows up, its meat shall not thereby be rendered unlawful, but it shall be disapproved.

Problem # 27. There are fourteen things of a lawful animal that are prohibited to eat. They are its blood, excrete, spleen, male organ, the outer and inner parts of its female organ, testicles, bladder, gall bladder, spinal marrow, that is a white thread like brain in the middle of the spinal chord of the backbone, and glands, they are all the round knots in the body mostly resembling a bullet, placenta, where the foetus lies, and it is necessary to be cautious about what is close to it and comes out along with it, the two broad, yellow nerves spreading from the neck to the tale, brain pearl, that is a granule equal to a chick-pea of somewhat dust-colour, having a colour opposite that of the brain lying in the skull, pupil of the eye, and that means the granule of sight in the eye and not the whole body of the eye.

Problem # 28. The prohibition of the above mentioned things are exclusively applicable to the animals that are slaughtered by slitting the throat or piercing a spear into the neck of the animal. So nothing of the fish and locust is prohibited except their blood and excrete, in which case too there is hesitation.

Problem # 29. Caution must not be given up in abstaining from the above mentioned things found in the birds, as there is no hesitation in the prohibition of their excrete and blood.

Problem # 30. Everything of a slaughtered animal is eaten to the exclusion of what has been mentioned above. So one may eat its heart, liver, paunch, entrails, cartilage, muscles, etc. Of course, it

مسألة ٢٩ ـ لا يترك الاحتياط بالاجتناب عن كل ما وجد من المذكورات في الطيور، كما لا إشكال في حرمة الرجيع والدم منها.

مسألة ٣٠ ـ يؤكل من الذبيحة غير ما مرّ، فيؤكل القلب و الكبد والكرش و الأمعاء و الغضروف و العضلات و غيرها، نعم يكره الكليتان و أذنا القلب و العروق خصوصاً الأوداج، و هل يؤكل منها الجلد والعظم مع عدم الضرر أم لا؟ أظهر هما الأول و أحوطهما الثاني، نعم لا إشكال في جلد الرأس و جلد الدجاج و غيره من الطيور، و كذا في عظم صغار الطيور كالعصفور.

مسألة ٣١ ـ يجوز أكل لحم ما حل أكله نيًّا و مطبوخا، بل و محروقاً إذا لم يكن مضراً، نعم يكره أكله غريضاً أي كونه طرياً لم يتغير بالشمس و لا النـار ولابذر الملح عليه و تجفيفه في الظل و جعله قديداً.

مسألة ٣٢ ـ اختلفوا في حلية بول ما يؤكل لحمه كالغنم و البقر عند عدم الضرورة و عدمها، و الأول هوالأقوى، كما لا إشكال في حلية بول الابل للاستشفاء.

مسألة ٣٣ ـ يحرم رجيع كل حيوان ولو كان ممّا حل أكله، نعم الظاهر عدم حرمة فضلات الديدان الملتصقة بأجواف الفواكه و البطائخ و نحوها وكذا ما في جوف السمك والجراد إذا أكل معهما.

مسألة ٣٤ ـ يحرم الدم من الحيوان ذي النفس حتى العلقة عدا ما يتخلف في الذبيحة على إشكال فيما يجتمع منه في القلب والكبد، وأما الدم من غير ذي النفس فما كان ممّا حرم أكله كالوزغ و الضفدع فلا إشكال في حرمته، و ما كان مما حل أكله كالسمك الحلال ففيه خلاف، و الظاهر حليته إذا أكل مع السمك بأن أكل السمك بدمه، و أما إذا أكل منفرداً ففيه إشكال، و الأحوط الاجتناب من الدم في البيضة و إن كان طاهراً.

مسألة ٣٥ ـ قد مرّ في كتاب الطهارة طهارة ما لا تحله الحياة من الميتة حتى اللبن و البيضة اذا اكتست جلدها الأعلى الصلب و الانفحة، و هي كما أنها

is disapproved to eat the kidneys, the two ears of the heart, the veins, particularly the jugular veins. Whether it is lawful to eat their skin and bones without any harm or not, the more evident opinion is in favour of the fist, while the more cautious one being in favour of the latter. Of course, there is no objection in eating the skin of the head and the skin of the fowl, etc. from among the birds. The same is the case with the bones of the small birds, like a sparrow.

Problem # 31. The meat that is lawful to eat may be eaten cooked or uncooked, rather even when it is burnt, if it is not harmful to eat. Of course, it is disapproved to eat fresh meat the colour of which is not changed in the sun or on the fire, by pouring salt on it, drying in the shade and turned into jerked meat.

Problem # 32. There is difference of opinion on the lawfulness or unlawfulness of urine of the animals the meat of which is eaten like sheep and goats and cows without any need. The stronger opinion is in favour of the first option, as there is no hesitation in lawfulness of the urine of a camel as a medicine.

Problem # 33. The excreta of all animals is prohibited, even if it belongs to the animals the meat of which is lawful to eat. Of course, apparently the excreta of the worms attached to the interior of the fruits and melons, etc. is not unlawful. The same is the case with what is inside the fish or locust when it is eaten along with it.

Problem # 34. The blood of the animals having spurting blood, even their blood clot is unlawful to eat, except what is left in a slaughtered animal, though with hesitation, as the blood that gathers in the heart or liver.

As regards the animals other than those having spurting blood from among those that are unlawful to eat like a frog or a tadpole, there is no hesitation in declaring their blood unlawful to eat. As regards the animals from among them the meat of which is lawful to eat, there is difference of opinion over their blood being lawful or unlawful. Apparently, it is lawful when one eats it along a fish, as when one eats a fish along with its blood. But if one eats it separately, there is hesitation. It is more cautious to abstain from taking the blood lying in an egg, although it is clean.

Problem # 35. It has already been mentioned in the Section on Cleanliness that what belongs to a dead animal in which life has not yet been infused like its milk or egg that has formed a hard shell is clean and also lawful to eat.

Problem # 36. There is no hesitation in the prohibition of puss, dirt, phlegm and mucus of all the animals. Regards the saliva and sweat of an animal that is not unclean by nature, apparently they are lawful, particularly the former, particularly when they belong to a human being or to an animal the meat of which is lawful to eat.

طاهرة حلال أيضاً.

مسألة ٣٦ ـ لا إشكال في حرمة القيح و الوسخ و البلغم والنخامة من كل حيوان، و أما البصاق و العرق من غير نجس العين فالظاهر حليتها خصوصاً الأول، و خصوصاً إذا كان من الانسان أو ممّا يؤكل لحمه من الحيوان.

القول في غير الحيوان

مسألة ١ ـ يحرم تناول الأعيان النجسة، و كذا المتنجسة ما دامت باقية على النجاسة، مائعة كانت أو جامدة.

مسألة ٢ ـ يحرم تناول كل ما يضر بالبدن، سواء كان موجباً للهلاك كشرب السموم القاتلة و شرب الحامل ما يوجب سقوط الجنين، أو سبباً لانحراف المزاج، أو لتعطيل بعض الحواس الظاهرة أو الباطنة، أو لفقد بعض القوى، كالرجل يشرب ما يقطع به قوة الباه و التناسل، أو المرأة تشرب ما به تصير عقيماً لا تلد.

مسألة ٣ ـ لا فرق في حرمة تناول المضر على الأقوى فيما يوجب التهلكة و على الأحوط في غيره بين معلوم الضرر و مظنونه، بل و محتمله أيضاً إذا كان احتماله معتداً به عند العقلاء بحيث أوجب الخوف عندهم. و كذا لا فرق بين أن يكون الضرر المترتب عليه عاجلاً أو بعد مدة.

مسألة ٤ ـ يجوز التداوي و المعالجة بما يحتمل فيه الخطر و يؤدي اليه أحياناً إذا كان النفع المترتب عليه حسب ما ساعدت عليه التجربة و حكم به الحذاق و أهل الخبره غالبياً، بل يجوز المعالجة بالمضر العاجل الفعلي المقطوع به إذا يدفع به ما هو أعظم ضرراً و أشدّ خطرا، و من هذا القبيل قطع بعض الأعضاء دفعاً للسراية المؤدية إلى الهلاك و بط الجرح، والكي بالنار، و بعض العمليات المعمولة في هذه الأعصار بشرط أن يكون الاقدام على ذلك جارياً مجرى العقلاء، بأن يكون المباشر للعمل حاذقاً محتاطاً مبالياً غير مسامح و لا متهور.

Chapter Two - Concerning Things Other Than Animals

Problem # 1. Eating and drinking every unclean thing is prohibited, and so are the things that have become unclean due to contact with an unclean object as long as they remain unclean, regardless whether they are solid or liquid.

Problem # 2. Eating and drinking every thing that is injurious for one's body is prohibited, irrespective of its causing death as fatal poisons, or a pregnant woman's drinking what causes abortion, or indisposition or the suspension of any external or internal senses, or the deprivation of any of the powers, as when a man drinks what deprives him of the sexual and procreative power, or a woman drinks something that turns her sterile and unproductive.

Problem # 3. According to the stronger opinion, there is no difference between the prohibition of eatring or drinking what is injurious causing certain death and, according to the more cautious opinion, what is otherwise between the thing the harmfulness of which is known or a thing the harmfulness of which is suspected, rather even if it is likely, when its likelihood is admitted by the wise and is considered awful by them.

Similarly, there is no difference when its resultant harm is immediate or after the lapse of some time.

Problem # 4. It is permissible to employ for mediation and treatment something in which there lies danger and which sometimes occurs if the advantage mostly accruing from it is what is supported by experience and judgement of the experts and well-informed persons. Rather it is permissible to employ for treatment what would cause certainly an immediate harm while it would remove what is of greater harm and stronger danger.

To this category belongs the cutting of some limbs, splitting the wound or corterise it, or some of the operations current in this age in order to avoid infection leading to death, provided that such actions are in conformity with the practice of the wise, and the person conducting the operation must do it with utmost care, caution and expertise without any negligence or rashness.

مسألة ٥ ـ ما كان يضر كثيره دون قليله يحرم كثيره المضر دون قليله غير المضر، ولو فرض العكس كان بالعكس، و كذا مايضر منفرداً لا منضماً مع غيره يحرم منفرداً، و ما كان بالعكس كان بالعكس.

مسألة ٦ ـ ما لا يضر تناوله مرة أو مرتين مثلاً لكن يضر إدمانه و زيادة تكريره و التعود به يحرم تكريره المضر خاصة.

مسألة ٧ ـ يحرم أكل الطين، و هو التراب المختلط بالماء حال بلته، و كذا المدر، و هو الطين اليابس، و يلحق بهما التراب على الاحوط و إن كان عدم الالحاق لا يخلو من قوة إلا مع إضراره، ولا بأس بما يختلط به الحنطة أو الشعير مثلاً من التراب والمدر و صارا دقيقاً و استهلك فيه، و كذا ما يكون على وجه الفواكه و نحوها من التراب و الغبار، وكذا الطين الممتزج بالماء ـ المتوحل ـ الباقي على إطلاقه، نعم لو أحس ذائقته الأجزاء الطينية حين الشرب فالأحوط الاجتناب إلى أن يصفو و إن كان الأقرب جواز شربه مع الاستهلاك .

مسألة ٨ ـ الظاهر أنه لا يلحق بالطين الرمل و الأحجار و أنواع المعادن فهي حلال كلها مع عدم الضرر.

مسألة ٩ ـ يستثنى من الطين طين قبر سيدنا أبي عبدالله الحسين عليه السلام للاستشفاء، و لا يجوز أكله لغيره، و لا أكل ما زاد عن قدر الحمصة المتوسطة، و لا يلحق به طين غير قبره حتى قبر النبي صلى الله عليه و آله و الأئمة عليهم السلام على الأقوى، نعم لا بأس بأن يمزج بماء أو شربة و يستهلك فيه و التبرك و الاستشفاء بذلك الماء و تلك الشربة.

مسألة ١٠ ـ ذكر لأخذ التربة المقدسة و تناولها عند الحاجة آداب و أدعية، لكن الظاهر أنها شروط كمال لسرعة الاجابة، لا شرط لجواز تناولها.

مسألة ١١ ـ القدر المتيقن من محل أخذ التربة هو القبر الشريف و ما يلحق به عرفاً، و الأحوط الاقتصار عليه، و أحوط منه استعمال الترب التي في هذه الأعصار ممزوجا بالماء أو غيره على نحو الاستهلاك ، بل لا يترك هذا الاحتياط إذا

Problem # 5. If there is a thing the major part of which is injurious but a smaller part of it is not so, then its major part that is injurious shall be prohibited, excluding the smaller part that is not so. If, suppose, the case is reverse, its rule shall also be reverse. Similarly, if there is something that is harmful when used alone but not when used along with something else, its separate use shall be forbidden, and where the case is reverse the rule shall also be reverse.

Problem # 6. If there is something that if eaten or drunk, for example, once or twice is not harmful but if taken consistently and repeatedly it is harmful, then its harmful repetition shall be forbidden.

Problem # 7. Eating mud is prohibited, and that is earth mixed with water, while it is wet. The same is the case with a dry earth, and, according to the more cautious opinion, to the same category belongs dust, though its non-prohibition is not devoid of force, except when it is harmful. There is no objection if the dust or dry earth is mixed, for example, with wheat or barley and it is grinded and fully mixed up, [losing its separate entity]. Likewise, there is no objection in eating the dust that gathers on the fruits or the like. The same is the case with the earth mixed with water in a way that the water may be called pure. Of course, if there is a feeling of the taste of its earthen ingredient, then it is more cautious to refrain from taking it until it is cleaned, though, according to the opinion closer to the traditional authority, it is permissible to drink it provided that it is fully dissolved.

Problem # 8. Apparently sand, rocks and the different kinds of minerals are not affiliated with dust, and they are all lawful to eat provided that they are not harmful.

Problem # 9. The dust of the grave of our master, Abū 'Abdillāh al-Ḥusayn, taken as medicine is exempted from the prohibition of eating dust, but is not lawful to eat it for a purpose other than medicine. It is not lawful to eat it more than the amount of an average chick-pea. According to the stronger opinion, to this lawful dust is not affiliated the dust of the grave of any person other than that of Imām Ḥusayn, including even the grave of the Prophet, Allah's Blessings be upon him and his Progeny or that of the [other] Imāms. If, however, the dust of the graves of these holy persons is mixed with water or syrup in a way that it is fully dissolved, there is no objection in drinking it along with the water or syrup as a mark of respect by way of medicine.

Problem # 10. The ettiquetes and prayers relating to taking and eating the holy dust are mentioned [in the relevant books]. But apparently they are considered a complete condition for the immediate acceptance of the prayers, and not as a condition for the lawfulness of eating it.

Problem # 11. The certain value o the place for taking the dust is the holy grave and what is usually considered to be affiliated to it. To be more cautious one must confine to these places alone, and more cautious that it is the use of the dust in these days mixed with water etc. in a way that the dust loses its separate entity. Rather this caution must not be given up whether what is taken is dust or dry earth. Of course, on the basis of what we have said about the absolute unlawfulness of dust, there is not objection if it is taken as a medicine from the *Ḥaram* upto one mile from it, rather even farther as mentioned in the reports if taken by way of hope, and it is not forbidden to eat or drink it, but caution must not be given up.

كان المأخوذ طيناً أو مدراً. نعم بناء على ما قدمناه من عدم حرمة التراب مطلقا لا بأس بأخذه للاستشفاء من الحائر وغيره إلى رأس ميل، بل أزيد مما اشتملت عليه الأخبار بقصد الرجاء، و لا يحرم تناوله، لكن لا ينبغي ترك الاحتياط.

مسألة ١٢ ـ تناول التربة المقدسة للاستشفاء إما بازدرادها و ابتلاعها و إما بحلها في الماء و شربه أو بأن يمزجها بشربة و يشربها بقصد الشفاء.

مسألة ١٣ ـ لو أخذ التربة بنفسه أو علم من الخارج بأن هذا الطين من تلك التربة المقدسة فلا إشكال، و كذا إذا قامت على ذلك البينة، بل الظاهر كفاية قول عدل واحد بل شخص ثقة، و في كفاية قول ذي اليد إشكال، و الأحوط في غير صورة العلم وقيام البينة تناولها بالامتزاج بماء أو شربة بعد استهلاكها.

مسألة ١٤ ـ لا يبعد جواز تناول طين الأرمني للتداوي، و لكن الأحوط عدم تناوله إلا عند انحصار العلاج أو ممزوجاً بماء و نحوه بحيث لا يصدق معه أكل الطين.

مسألة ١٥ ـ يحرم الخمر بالضرورة من الدين بحيث يكون مستحلها في زمرة الكافرين مع الالتفات إلى لازمه أي تكذيب النبي صلى الله عليه و آله و العياذ بالله، و قد ورد في الأخبار التشديد العظيم في تركها، و التوعيد الشديد في ارتكابها، و عن الصادق عليه السلام «أن الخمر أم الخبائث و رأس كل شر، يأتي على شاربها ساعة يسلب لبه فلا يعرف ربه، و لا يترك معصية إلا ركبها، و لا يترك حرمة إلا انتهكها، و لا رحماً ماسة إلا قطعها، و لا فاحشة إلا أتاها» و قد ورد «أن رسول الله صلى الله عليه و آله لعن فيها عشرة: غارسها و حارسها و عاصرها و شاربها و ساقيها و حاملها و المحمول إليه و بائعها و مشتريها و آكل ثمنها» بل نص في بعض الأخبار أنه أكبر الكبائر و في أخبار كثيرة أن «مدمن الخمر كعابدوثن» و قد فسر المدمن في بعض الأخبار بأنه ليس الذي يشربها كل يوم و لكنه الموطن نفسه أنه إذا وجدها شربها، هذا مع كثرة المضار في شربها التي إكتشفها حذاق الأطباء في هذه الأزمنة و أذعن بها المنصفون من غير ملتنا.

Problem # 12. The holy dust is eaten or drunk as a medicine by putting it in the mouth and swallowing it or by dissolving it in water and eating it, or by mixing it with syrup and drinking it as a medicine.

Problem # 13. If a person takes the dust himself or has received external knowledge that dust has been taken from the holy grave, there shall be no objection [in its lawfulness]. The same shall be the case if some evidence has been forwarded in favour of its being so. Rather the word of a just or reliable person is sufficient. There is, however, hesitation in accepting the word of its master. According to the more cautious opinion, in case of absence of knowledge or producing evidence, it may be drunk after mixing it with water or syrup after it is fully dissolved.

Problem # 14. Eating or drinking the Armenian clay as medicine is not far from being lawful, but according to the more cautious opinion, it should not be taken except by way of treatment alone or mixed with water, the criterion of which is that it must be taken if it is not to be treated as eating clay.

Problem # 15. Prohibition of wine is one of the essentials of [Islamic] faith, so that if a person considers it lawful he shall be treated to belong to the group of infidels with reference to its necessary corollary, that is, God Forbid, repudiating the Prophet, Allah's Blessings be upon him and his Progeny. There are reports that have come down in favour of its extremely strong prohibition, and vigorous warnings for those who violate it. It has been reported from [Imām Ja'far] al-Ṣādiq: "Wine is the mother of all Evils and the head of all bad deeds. There comes on the person who drinks it a time when his deprived of his sense, so that he does not recognize his Sustainer. He does not give up any sin but commits it, does not refrain from any honour but rips it apart, thee is no pressing mercy but he breaks it, and no vile deed but he perpetrates it". It has come down: "The Prophet, Allāh's Blessings be on him and his Progeny, has cursed ten persons related to wine, namely, one who plants [the vine of grapes from which it is made], one who takes care of it, one who extracts the juice [from which it is distilled], one who drinks it, one who gives it to others to drink, one who circulates it, one who carries it, one to whom it is carried, its seller and its buyer and one who eats its sale price." Rather, there is a textual authority in some reports that it is biggest of all the monstrous deeds. There are several reports saying: "One who drinks wine constantly is like one who worships the idols."

It has been explained before that by one who drinks wine constantly does not mean who drinks every day, but one in whose heart wine has made an abode, so that he drinks it wherever he finds it. This is in addition to what harms have been disclosed by the expert physicians in this age and even those not belonging to our community (of believers) have admitted them.

Problem # 16. To wine is affiliated every intoxicant as a subject and rule, irrespective of its being solid or fluid, and even if it intoxicates when taken in a large quantity but not in a small quantity, both its large quantity as well as small quantity are prohibited. So also if it is supposed that there are some human

مسألة ١٦ - يلحق بالخمر موضوعاً أو حكماً كل مسكر جامداً كان أو مائعاً، و ما أسكر كثيره دون قليله حرم قليله و كثيره، ولو فرض عدم إسكارها في بعض الطباع أو بعض الأصقاع أو مع العادة لا يوجب ذلك عدم حرمتها.

مسألة ١٧ - لو انقلبت الخمر خلاً حلت سواء كان بنفسها أو بعلاج، بدون مزج شيء بها أو معه، سواء استهلك الخليط فيها قبل أن تنقلب خلاً كما إذا مزجت بقليل من الملح أو الخل فاستهلكا فيها ثم انقلبت خلاً أو لم يستهلك بل بقي فيها الى ما بعد الانقلاب لكن بشرط أن يكون الخلط للعلاج و بمقدار متعارف، و أما مع الزيادة عنه فحل إشكال، بل مع الغلبة فالأقوى حرمتها و نجاستها، و يطهر الممتزج المتعارف الباقي بالتبعية كما يطهر بها الاناء.

مسألة ١٨ - و من المحرمات المائعة الفقاع إذا صار فيه نشيش و غليان و إن لم يسكر، و هو شراب معروف كان في الصدر الأول يتخذ من الشعير في الأغلب، و ليس منه ماء الشعير المعمول بين الأطباء.

مسألة ١٩ - يحرم عصير العنب إذا نش و غلى بنفسه أو غلّي بالنار، و أما العصير الزبيبي و التمري فيحلان إن غليا بالنار، و كذا إن غليا بنفسهما إلا إذا ثبت إسكارهما، والظاهر أن الغليان بالشمس كالغليان بالنار، فله حكمه.

مسألة ٢٠ - الظاهر أن الماء الذي في جوف حبة العنب بحكم عصيره، فيحرم إذا غلى بنفسه أو بالنار، نعم لا يحكم بحرمته ما لم يحرز غليانه، فلو وقعت حبة من العنب في قدر يغلي وهي تعلو و تسفل في الماء المغلي فلا تحرم ما لم يعلم بغليانه، و مجرد ما ذكر لا يوجب غليان جوفها.

مسألة ٢١ - من المعلوم أن الزبيب ليس له عصير في نفسه، فالمراد بعصيره ما اكتسب منه الحلاوة، إما بأن يدق و يخلط بالماء و إما بأن ينقع في الماء و يمكث إلى أن يكتسب حلاوته بحيث صار في الحلاوة بمثابة عصير العنب، و إما بأن يمرس و يعصر بعد النقع فيستخرج عصارته، و أما اذا كان الزبيب على حاله و حصل في جوفه ماء فالظاهر أن ما فيه ليس من عصيره، فلا يحرم بالغليان ولو

natures or some regions or being habituated it does not bring inebriety to its drinker, it shall nevertheless does not necessarily does not negate its prohibition.

Problem # 17. If wine turns into vinegar, it shall become lawful to eat, irrespective of its turning vinegar by itself or by means of something else, and regardless whether something is mixed with it or not, and whether the thing mixed with it dissolves in it before it turns into vinegar, as when a little salt or vinegar is added to it and then it turns into vinegar, or it does not dissolve and remains intact even after it turns into vinegar, but on the condition that what is mixed with it is meant for turning it into vinegar and in the usual amount, but in case it exceeds the usual amount, then there shall be hesitation [in its lawfulness]. Rather, in case the thing mixed becomes dominant, then, according to the stronger opinion, it shall be rendered unlawful and unclean. In case what is mixed remains intact and is up to the usual amount, it shall also become clean in pursuance of the wine as the container of wine also becomes clean after it turns into vinegar.

Problem # 18. Among the unlawful liquids is also beer when it becomes ebullient and boiling up, even if not intoxicant. It is a well-known wine that in the early days of Islam was mostly made of barley.

Barley water that is commonly used by the physicians does not fall in the category of beer.

Problem # 19. Grape juice becomes unlawful when it becomes ebullient or boiling up by itself or on fire. But the juice of currants or dates is lawful even if it is boiled on fire. The same is the case even if it becomes ebullient by itself, except its being intoxicant is established. Apparently boiling in the sun is like boiling on fire, and is governed by the same rules.

Problem # 20. Apparently the water that is in the in the grape seed is governed by the rule of grape juice, and, therefore, it becomes unlawful when it becomes ebullient by itself or is boiled on fire. Of course, it does not become unlawful if its ebullience is not established. If a grape seed falls into a boiling pot and it goes up and down in the boiling water, it shall not be declared unlawful unless its ebullience is not known, and by merely boiling does not necessarily makes its interior ebullient.

Problem # 21. It is evident that currant does not have juice by itself. So by its juice is meant the water that makes it sweet. So either by grinding it or mixing it with water or by soaking it in the water and leaving it there until it turns sweet and its sweetness is like that of grape juice, or when it is soaked in water and then pressed after being soaked, then its juice is extracted. But if the currant remains intact and water enters into its interior, then apparently what lies within it is not its juice, and so it is not rendered unlawful by boiling, even if we have said that the ebullient currant juice is unlawful. Therefore there is no objection in eating the currant or raisin that is thrown into cooked food, meatballs or *Dolmeh* [or food stuffed with minced meat] or the like, even if water enters in its interior and it is boiled up, let

قلنا بحرمة عصيره المغلي، فلا إشكال فيما وضع في طبيخ أو كبة أو محشي و نحوها و إن ورد فيه ماء و غلى فضلاً عما إذا شك فيه.

مسألة ٢٢ ـ الظاهر أن ما غلى بنفسه من أقسام العصير الذي قلنا بحرمته لا تزول حرمته إلا بالتخليل كالخمر، حيث انها لا تحل إلا بانقلابها خلاً، و لا أثر فيه لذهاب الثلثين، وأما ما غلى بالنار و نحوها فتزول حرمته بذهاب ثلثيه، و الأحوط أن يكون ذلك بالنار أو بما يغليه، لا بالهواء و طول المكث، نعم لا يلزم أن يكون ذهاب الثلثين في حال غليانه، بل يكفي ذلك إذا كان مستنداً إلى النار ولو بضميمة ما ينقص منه بعد غليانه قبل أن يبرد، فلو كان العصير في القدر على النار وقد غلى حتى ذهب نصفه ثلاثة أسداسه ثم وضع القدر على الأرض فنقص منه قبل أن يبرد بسبب صعود البخار سدس آخر كفى في الحلية.

مسألة ٢٣ ـ إذا صار العصير المغلي دبساً قبل أن يذهب ثلثاه لا يكفي في حليته على الأحوط.

مسألة ٢٤ ـ إذا اختلط العصير بالماء ثم غلى فذهب ثلثا المجموع ففي الحلية إشكال إلا إذا علم بذهاب ثلثي العصير.

مسألة ٢٥ ـ لو صب على العصير المغلي قبل أن يذهب ثلثاه مقدار من العصير غير المغلي وجب ذهاب ثلثي مجموع ما بقي من الأول مع ما صب ثانياً، و لا يحسب ما ذهب من الأول أولاً، فاذا كان في القدر تسعة أرطال من العصير فغلى حتى ذهب منه ثلاثة و بقي ستة ثم صب عليه تسعة أرطال أخر فصار خمسة عشر يجب أن يغلي حتى يذهب عشرة و يبقى خمسة، و لا يكفي ذهاب تسعة و بقاء ستة، لكن أصل هذا العمل خلاف الاحتياط، فالأحوط أن يطبخ كل على حدة و إن كان لما ذكرنا وجه.

مسألة ٢٦ ـ لا بأس بأن يطرح في العصير قبل ذهاب الثلثين مثل اليقطين و السفرجل و التفاح و غيرها و يطبخ فيه حتى يذهب ثلثاه فاذا حلّ حلّ ما طبخ فيه، لكن إذا كان المطروح مما يجذب العصير الى جوفه فلابد في حليته من

alone when it is doubtful.

Problem # 22. Apparently whatever juice of any kind boils up by itself that we have declared unlawful, its prohibition is not removed except by its turning into vinegar, so that it is not rendered lawful except on turning into vinegar, and it makes no effect even if it loses two-thirds of it. But what is boiled on fire or the like turns lawful when it loses two-thirds of it. According to the more cautious opinion, it must take place by boiling on fire or whatever boils, but not by air or length of time.

Of course, it is not necessary that it must two-thirds of it while boiling up. It is sufficient if it is attributed to boiling on fire even if it has an addition of the loss sustained after boiling but before becoming cold. If the juice was on fire in a cooking pot and it boils up until 3/6th of it evaporates, and then the pot is placed on earth, and another l/6th of it evaporates before it becomes cold, it shall be sufficient for its lawfulness.

Problem # 23. If the boiled juice becomes molasses before losing two-thirds of it, according to the more cautious opinion, it shall not be sufficient for its lawfulness.

Problem # 24. If the juice is mixed with water and then boiled up until it loses two-thirds of the total mixture, then there shall be hesitation in declaring it lawful unless it is known that two-thirds of the juice is evaporated.

Problem # 25. If before two-thirds of boiling juice is evaporated some more unboiled juice is added to it, it is obligatory that two-thirds of the total amount of the juice along with what has been added to the previous one must evaporate, and what has already been evaporated before the addition of the second juice shall not be accounted for. If there were 9 *Raṭls* of juice in a cooking pot and it was boiled up until one-third of it evaporated, and then there remain six *Raṭls* in the pot. Then another 9 *Raṭls* of juice are poured into the pot, raising the amount of juice in the pot to 15 *Raṭls*. It is obligatory that it must be boiled up until 10 *Raṭls* of it evaporate, leaving 5 *Raṭls* in the pot. But it is not sufficient if 9 *Raṭls* of it evaporate, leaving 6 *Raṭls*.

This is, however, initially against caution. It is more cautious to cook each of the juices separately, even if there is some significance of what we have mentioned here.

Problem # 26. There is no harm if before the evaporation of two-thirds of the juice something like squash, quince or apple is added, and it is cooked until it loses two-thirds of it, then when it is rendered lawful, its contents are also rendered lawful.

If what is added to the juice is something that absorbs the juice into it, it shall be indispensable for its lawfulness that two-thirds of what is in its interior must also evaporate.

Problem # 27. The loss of two-thirds of the ebullient juice is established by having knowledge or evidence or the information given by a Muslim who had it in his possession. Rather it shall be lawful

ذهاب ثلثي ما في جوفه أيضاً.

مسألة ٢٧ - يثبت ذهاب الثلثين من العصير المغلي بالعلم و بالبيّنة و باخبار ذي اليد المسلم، بل و بالأخذ منه إذا كان ممن يعتقد حرمة ما لم يذهب ثلثاه، بل و إذا لم يعلم اعتقاده أيضاً، نعم إذا علم أنه ممن يستحل العصير المغلي قبل أن يذهب ثلثاه مثل أن يعتقد أنه يكفي في حليته صيرورته دبساً أو اعتقد أن ذهاب الثلثين لا يلزم أن يكون بالنار بل يكفي بالهواء و طول المكث أيضاً ففي جواز الاستئمان بقوله إذا أخبر عن حصول التثليث خلاف و إشكال، و أولى بالاشكال جواز الأخذ منه و البناء على أنه طبخ على الثلث إذا احتمل ذلك من دون تفحص عن حاله، فالأحوط الاجتناب عنه و عدم الاعتماد بقوله و عدم البناء على تثليث ما أخذ منه، بل لا يخلو من قوة.

مسألة ٢٨ - يحرم تناول مال الغير و إن كان كافراً محترم المال بدون إذنه و رضاه، و لابد من إحراز ذلك بعلم و نحوه، و قد ورد «من أكل من طعام لم يدع اليه فانّما أكل قطعة من النار».

مسألة ٢٩ - يجوز أن يأكل الانسان ولو مع عدم الضرورة من بيوت الآباء و الأمهات و الأولاد و الاخوان و الأخوات والأعمام والعمات والأخوال و الخالات و الأصدقاء، وكذا الزوجة من بيت زوجها، و كذا يجوز لمن كان وكيلاً على بيت أحد مفوضاً اليه أموره و حفظه بما فيه أن يأكل من بيت موكله، و انما يجوز الأكل من تلك البيوت إذا لم يعلم كراهة صاحب البيت، فيكون امتيازها، عن غيرها بعدم توقف جواز الأكل منها على إحراز الرضا و الاذن من صاحبها،فيجوز مع الشك بل مع الظن بالعدم أيضاً على الأقوى، لكن لا ينبغي ترك الاحتياط خصوصاً مع غلبته، و الأحوط اختصاص الحكم بما يعتاد أكله من الخبز و التمر و الادام و الفواكه و نحوها دون نفائس الأطعمة التي تدخر غالباً لمواقع الحاجة و للأضياف ذوي الشرف و العزة، و الظاهر التعدية الى غير المأكول من المشروبات العادية كاللبن المخيض و اللبن الحليب و غيرها، و لا

[only] when it is obtained from a person who believes in its unlawfulness before the loss of its two-thirds. Rather even when one does not know his belief. Of course, if it is known that he is one of those believe in lawfulness of the ebullient juice before the loss of its two- thirds, for example when he believes in its lawfulness in the event of its becoming molasses, or that the evaporation of its two-thirds on fire is not necessary, and it is sufficient if it takes place by air or the passage of time. In such case, there is difference of opinion and hesitation on relying on his information about the loss of its two-thirds. There is greater hesitation on permissibility of obtaining it from such person and suppose that he has already boiled it and evaporated one-third of it, without making due enquiry about its actual position. It is more cautious to refrain from it and not relying on his statement, without considering that its one-third has already evaporated. Rather, this rule is not devoid of force.

Problem # 28. Eating and drinking anything belonging to another is prohibited, even if its owner is an infidel whose right of property has to be honoured, when it is taken without his permission and consent that is indispensable through his knowledge or the like. It has come down in a tradition: "One who eats food to which he is not invited is as if he has eaten a piece of fire."

Problem # 29. It is permissible if one eats, even without an emergency, anything from the houses of one's father or grandfather, mother or grandmother, children, brothers and sisters, paternal and maternal uncles and aunts and close friends. Likewise it is permissible for a wife to eat anything from the house of her husband. Similarly it is permissible for a person who has been appointed as an agent to look after and protect another person's house and its contents to eat anything from the house of his client. It is, however, permissible to eat anything from such houses when the reluctance of their owner to this effect is not known. So such houses have to be distinguished from other houses where there is no need of obtaining the permission and willingness of their owners for eating anything from them.

According to the stronger opinion, therefore, it is also permissible in case of doubt, rather even with the assumption to the contrary, but one should not give up caution in case of such doubt being stronger.

It is more cautious to confine the rule of permissibility to eating what is usual to eat as bread, dates, curry, fruits and the like, excluding the high quality food that is mostly stored for necessary occasions and noble and honourable guests.

Apparently the permissibility would apply to other than food as ordinary drinks as milk or diluted milk or yoghurt, etc.

However, it neither applies to the houses of persons other than those mentioned above, nor to other than houses like shops and gardens, as the permissibility is confined to the food lying in houses,

يتعدى الى بيوت غير هم و لا إلى غير بيوتهم كدكاكينهم و بساتينهم، كما أنه يقتصر على ما في البيت من المأكول، فلا يتعدى الى ما يشترى من الخارج بثمن يؤخذ من البيت.

مسألة ٣٠ ـ تباح جميع المحرمات المزبورة حال الضرورة إما لتوقف حفظ نفسه و سد رمقه على تناوله، أو لعروض المرض الشديد الذي لا يتحمل عادة بتركه، أو لأداء تركه إلى لحوق الضعف المفرط المؤدي الى المرض الذي لا يتحمل عادة أو إلى التلف أو المؤدي الى التخلف عن الرفقة مع ظهور أمارة العطب. و منها ـ ما إذا أدى تركه إلى الجوع والعطش اللذين لا يتحملان عادة، ومنها ـ ما إذا خيف بتركه على نفس أخرى محترمة، كالحامل تخاف على جنينها والمرضعة على طفلها، بل و منها خوف طول المرض الذي لا يتحمل عادة أو عسر علاجه بترك التناول، و المدار في الكل هو الخوف الحاصل من العلم أو الظن بالترتب، بل الاحتمال الذي يكون له منشأ عقلائي لا مجرد الوهم و الاحتمال.

مسألة ٣١ ـ و من الضرورات المبيحة للمحرمات الاكراه و التقية عمن يخاف منه على نفسه أو نفس محترمة أو على عرضه أو عرض محترم أو مال محترم منه معتد به مما يكون تحمله حرجياً أو من غيره كذلك.

مسألة ٣٢ ـ في كل مورد يتوقف حفظ النفس على ارتكاب محرم يجب الارتكاب، فلا يجوز التنزه و الحال هذه، و لا فرق بين الخمر و الطين و بين سائر المحرمات، فاذا أصابه عطش حتى خاف على نفسه جاز شرب الخمر بل وجب، و كذا إذا اضطر الى غيرها من المحرمات.

مسألة ٣٣ ـ لو اضطر الى محرم فليقتصر على مقدار الضرورة، و لا يجوز له الزيادة فاذا اقتضت الضرورة أن يشرب الخمر أو يأكل الميتة لدفع الخوف على نفسه فليقتصر على ذلك، و لا يجوز له الزيادة.

مسألة ٣٤ ـ يجوز التداوي لمعالجة الأمراض بكل محرم اذا انحصر به العلاج ولو بحكم الحذاق من الأطباء الثقات، و المدار هو انحصاره بحسب تشخيصهم مما

and it does not extend to what is obtained against payment of its price from the house.

Problem # 30. In case of an emergency all the above-mentioned forbidden things become lawful, either due to the dependence of saving oneself or keeping body and soul together, or due to the occurrence of strong disease that is intolerable if it is given up, or its giving up would result in death or lead to leaving friends and companions, in the event of imminent signs of damage, as giving it up may entail hunger or thirst that is not usually tolerable, or when there is fear of loss of another honourable life in giving it up, as when a pregnant woman apprehends damage to her foetus or a nursing woman fears harm to her suckling. Rather even if there is fear of protracting the disease that is not usually tolerable or its cure becomes difficult by not eating the forbidden things.

The criterion in all these cases is the apprehension arising from the knowledge or assumption of such occurrence, or likelihood of such event having a reasonable basis and not mere conjecture or doubt.

Problem # 31. The dire needs that render the forbidden things lawful is the reluctance or restraint from a person from whom one apprehends loss of his own life or that of another honourable person or damage to his own honour or that of another honourable person or that of considerable property tolerance of which is uncomfortable, etc.

Problem # 32. In every case where the protection of one's life depends on the commission of a forbidden act, it is obligatory to commit it, and in such position one is not allowed to restrain oneself.

There is no difference between wine, dust and other forbidden things.

If a person is afraid of loss of life, he is allowed to drink wine, rather it is obligatory upon him to do so.

The same is the case when there is dire need for other forbidden things.

Problem # 33. In case of a dire need for a forbidden thing, one must confine oneself to the extent one needs it indispensably, and he is not allowed to exceed the limit.

If one is compelled to drink wine or eat a carcass in order to save oneself from the fear of loss of his life, he must confine oneself to that extent and should not commit excess.

Problem # 34. It is allowed to treat oneself with any forbidden thing if the cure depends solely on it if prescribed by experts from reliable physicians.

The criterion is dependence on their diagnosis that is within the normal limits and not to the extent what is beyond human perception.

Problem # 35. According to the prevalent opinion it is not permissible to use wine or any intoxicant for

بين أيدي الناس مما يعالج به لا الواقع الذي لا يحيط به إدراك البشر.

مسألة ٣٥ ـ المشهور على ما حكي عدم جواز التداوي بالخمر بل بكل مسكر حتى مع الانحصار، لكن الجواز لا يخلو من قوة بشرط العلم بكون المرض قابلاً للعلاج، و العلم بأن تركه يؤدي الى الهلاك أو إلى ما يدانيه، والعلم بانحصار العلاج به بالمعنى الذي ذكرناه، و لا يخفى شدة أمر الخمر، فلا يبادر الى تناولها والمعالجة بها إلا إذا رأى من نفسه الهلاك أو نحوه لو ترك التداوي بها ولو بسبب توافق جماعة من الحذاق و أولي الديانة والدراية من الأطباء، و إلا فليصطبر على المشقة، فلعل البارىء تعالى شأنه يعافيه، لما رأى منه التحفظ على دينه أو يعطيه الثواب الجزيل على صبره.

مسألة ٣٦ ـ لو اضطر إلى أكل طعام الغير لسد رمقه و كان المالك حاضراً فان كان هو أيضاً مضطراً لم يجب عليه بذله، و هل لا يجوز له ذلك؟ فيه تأمل، ولا يجوز للمضطر قهره، و إن لم يكن مضطراً يجب عليه بذله للمضطر، و إن امتنع عن البذل جاز له قهره بل مقاتلته والأخذ منه قهراً، و لا يتعين على المالك بذله مجاناً، فله أن لا يبذله إلا بالعوض، و ليس للمضطر قهره بدونه، فان اختار البذل بالعوض فان لم يقدره بمقدار كان له عليه ثمن مثل ما أكله إن كان قيمياً أومثله إن كان مثلياً، و إن قدّره لم يتعين عليه تقديره بثمن المثل أو أقل، بل له أن يقدّره بازيد منه ما لم ينته إلى الحرج، و إلا فليس له، فبعد التقدير إن كان المضطر قادراً على دفعه يجب عليه الدفع إن طالبه به، و إن كان عاجزاً يكون في ذمته، هذا إذا كان المالك حاضراً، ولو كان غائباً فله الأكل منه بقدر سد رمقه و تقدير الثمن و جعله في ذمته، و لا يكون أقل من ثمن المثل، والأحوط المراجعة الى الحاكم لووجد، و مع عدمه فالى عدول المؤمنين.

مسألة ٣٧ ـ يحرم الأكل على مائدة يشرب عليها شيء من الخمر بل و غيرها من المسكرات، و كذا الفقاع، ثم إن للأكل و الشرب آداباً مندوبة و مكروهة مذكورة في المفصلات فليراجع اليها.

treatment even if it is the sole medicine for cure. But the permissibility is not devoid of force on the condition that there is knowledge of the disease being curable, and that if the forbidden thing is avoided, it would lead to death or to the verge of death. The knowledge about the forbidden thing being the sole medicine for the cure must be in the sense we have mentioned. The strong prohibition of wine is not a secret, and so one must not resort to drinking it and use it as a medicine, except when he realises that if he avoids its use as a medicine it shall lead to the loss of his life or the like provided there is agreement of a group of experienced physicians who are highly religious and specialist; otherwise, one must have patience to tolerate the pain, may be the Exalted Creator bestows cure upon him for noticing his preservation of limits imposed by his faith and award him a great reward for his patience.

Problem # 36. If a person is compelled out of emergency to eat the food belonging to someone else in order to keep body and soul together, while its owner is present, then if he is also in dire need of it, the owner shall not be bound to offer it. Whether the owner is not allowed to do so, there is hesitation in it, and it is not permissible for the person in dire need to compel the owner. If the owner is not in dire need of it, he shall be bound to offer it to the person who needs it urgently.

In case the owner fails to offer it, it shall be permissible for the person in dire need of it to compel him to do so, rather fight with him and get it from him forcibly. It is not a condition for the owner to offer it gratis, and so he is justified in not offering to the other without compensation, and the other is not justified to get it forcibly without compensation. If the owner opts to give it against compensation, then if the other is not able to pay it fully, the owner shall be entitled to the proper price from him if it is paid by way of price, or pay it in the same kind if it is something to be paid in the same kind. If the owner fixes its price, he shall not be compelled to fix it equivalent to the proper one or less than it; rather he shall be entitled to fix it even more than that unless it does not entail discomfort to the other; otherwise, he shall not be entitled to do so. After the fixation of the price, if the person in need is able to pay it, he shall be bound to pay it on the owner's demand. In case of his inability to pay it, he shall be liable to pay it. This is the case when the owner is there. In case, however, the owner is not there, the other may eat it up to what enables him to keep his body and soul together. He shall be bound to fix its price and make himself liable for its payment, but it should not be less than the proper price. It is more cautious to refer the case to a judge, if available. In case of his unavailability, he may refer it to the just believers.

Problem # 37. It is forbidden to eat anything at the table upon which wine or any other intoxicant is drink. The same is the case with beer. There are approved and disapproved etiquettes for eating and drinking, mentioned in detailed books, to which one may refer [for further details].

كتاب الغصب

و هو الاستيلاء على ما للغير من مال أو حق عدواناً، و قد تطابق العقل و النقل كتاباً و سنةً و إجماعاً على حرمته، و هو من أفحش الظلم الذي قد استقل العقل بقبحه، و في النبوي «من غصب شبراً من الأرض طوقه الله من سبع أرضين يوم القيامة» و في نبوي آخر «من خان جاره شبراً من الأرض جعله الله طوقاً في عنقه من تخوم الأرض السابعة حتى يلقى الله يوم القيامة مطوقاً إلا أن يتوب و يرجع» و في آخر «من أخذ أرضاً بغير حق كلف أن يحمل ترابها الى المحشر» و من كلام أمير المؤمنين عليه السلام «الحجر الغصب في الدار رهن على خرابها».

مسألة ١ ـ المغصوب إما عين مع المنفعة من مالك واحد أو مالكين و إما عين بلا منفعة، و إما منفعة مجردة، و إمّا حق مالي متعلق بعين، فالأول كغصب الدار من مالكها و كغصب العين المستأجرة من المؤجر و المستأجر، و الثاني كما إذا غصب المستأجر العين المستأجرة من مالكها في مدة الاجارة، و الثالث كما إذا أخذ المؤجر العين المستأجرة و انتزعها من يد المستأجر و استولى على منفعتها مدة الاجارة، و الرابع كما إذا استولى على أرض محجرة أو عين مرهونة بالنسبة الى المرتهن الذي له فيها حق الرهانة، و من ذلك غصب المساجد و المدارس و

SECTION THIRTY-FIVE

USURPATION (*GHAṢB)*

Usurpation is the forcible occupation of another's property or right. Human reason, and what has been mentioned in the Book [Qur'ān], *Sunnah* and Consensus (*Ijmā'*) all agree on its being forbidden. It is one of the most atrocious oppressions that have been condemned by human reason independent [of the other courses].

It has been related in the Prophetic Tradition: "Whoever shall usurp a foot of land, Allāh shall hang seven earths on his neck on the Day of Judgement."

Another Prophetic Tradition says: "Whoever betrays his neighbour even a foot of land, Allāh shall prepare a yoke of the limits of seven earths and he shall meet Allāh on the Day of Judgement with that yoke on his neck, except that he should have repented and fallen back."

Likewise, there is another Tradition saying: "Whoever occupies land without right shall be liable to carry its earth until Resurrection."

According to one of the sayings of Amīr al-Mu'minīn ['Alī], Peace be upon him: "A single piece of usurped stone in a house is enough for its destruction."

Problem # 1. A usurped thing may be a property with usufruct belonging to a single owner or two owners, a property without usufruct, a financial title belonging to a property. The first is like the usurpation of a house from its owner, or the usurpation of a leased property from the lessor and lessee, the second is like the usurpation of a leased property from the lessor by the lessee, while the third is like the case when a lessor occupies a leased property and deprives the lessee of it during the period of lease and seizes its usufruct during the period of lease, and the fourth is like the case when one seizes an interdicted land or a mortgaged property from the mortgagee who has the right of mortgage in it, and that is like the usurpation of mosques, schools, caravansarys, bridges, roads or public highways.

Similarly, there is the usurpation of a place that had previously been in the possession of someone belonging to mosques or shrines on the basis of likelihood according to caution.

الرباطات و القناطر و الطرق و الشوارع العامة، و كذا غصب المكان الذي سبق اليه أحد من المساجد و المشاهد على احتمال موافق للاحتياط.

مسألة ٢ ـ المغصوب منه قد يكون شخصاً كما في غصب الأعيان و المنافع المملوكة للأشخاص و الحقوق لهم، وقد يكون النوع أو الجهة كغصب الرباط المعدّ لنزول القوافل و المدرسة المعدة لسكنى الطلبة إذا غصب أصل المدرسة و منع عن سكنى الطلبة، و كغصب الخمس والزكاة قبل دفعهما إلى المستحق، و كغصب ما يتعلق بالمشاهد و المساجد و نحوهما.

مسألة ٣ ـ للغصب حكمان تكليفيان: و هما الحرمة و وجوب الرد الى المغصوب منه أو وليه، و حكم وضعي، و هو الضمان بمعنى كون المغصوب على عهدة الغاصب، و كون تلفه و خسارته عليه، و أنه إذا تلف يجب عليه دفع بدله، و يقال لهذا الضمان: ضمان اليد.

مسألة ٤ ـ يجري الحكمان التكليفيان في جميع أقسام الغصب، فالغاصب آثم فيها و يجب عليه الرد، و أما الحكم الوضعي و هو الضمان فيختص بما إذا كان المغصوب من الأموال عيناً كان أو منفعة، فليس في غصب الحقوق ضمان اليد.

مسألة ٥ ـ لو استولى على حرّ فحبسه لم يتحقق الغصب لا بالنسبة الى عينه و لا بالنسبة إلى منفعته، و إن أثم بذلك و ظلمه سواء كان كبيراً أو صغيراً، فليس عليه ضمان اليد الذي هو من أحكام الغصب، فلو أصابه حرق أو غرق أو مات تحت استيلائه من غير تسبيب منه لم يضمن، و كذا لا يضمن منافعه، كما إذا كان صانعاً و لم يشتغل بصنعته في تلك المدة فلا يضمن أجرته، نعم لو استوفى منه منفعة كما إذا استخدمه لزمه أجرته و كذا لو تلف بتسبيب منه مثل ما إذا حبسه في دار فيها حيّة فلدغته أو في محل السباع فافترسته ضمنه من جهة سببيته للتلف لا لأجل الغصب واليد.

مسألة ٦ ـ لو منع غيره عن إمساك دابته المرسلة أو من القعود على فراشه أو عن الدخول في داره أو عن بيع متاعه لم يكن غاصباً و إن كان عاصياً و ظالماً له

Problem # 2. The owner of the usurped property may be a person, as is the case of usurpation of a property and usufruct belonging to persons and their rights, or it may be meant for the public or some purpose, as the usurpation of a caravansary built for the caravans to stay in it, or a school (dormitory) built for residence of the students, provided the usurper usurps the actual school and prevents the residence of the students in it, or the usurpation of the Khums and Zakāt before their payment to those entitled to them, or the usurpation of what belongs to the mosques and shrines, or the like.

Problem # 3. There are two rules of liability for usurpation. One is its prohibition, and the other relates to the obligation of its restoration to the person from whom it has been usurped or his *Walī*. The other rule is situational, and that is the guarantee in the sense that the usurper is responsible for taking care of the usurped thing, so that in case of its loss or damage, he shall be liable to indemnify it. So in case of its loss, he shall be bound to restore its equivalent. This guarantee is called the guarantee for possession.

Problem # 4. The rule of liability for usurpation applies in all types of usurpations, and the usurper is the offender in it, and he is bound to restore the usurped thing [to its owner]. As regards the situational rule, that is the guarantee and so it is exclusively meant for the property whether it is the property itself or its usufruct. The guarantee for possession does not apply to the usurpation of rights.

Problem # 5. If a person overpowers another and confines him, no usurpation shall take place in it neither in relation to the property nor to its usufruct, though he shall be considered to have committed oppression, and his oppression shall be equal, whether he is a minor or an adult. So he shall not be liable for the guarantee of possession that relates to the rules of usurpation. If the confined person is burnt or drowned or dies during the confiner's possession without the confiner's fault, the latter shall not be held liable for it. So also he shall also not be held liable for the usufructs of the confined person, as when the confined person happens to be a craftsman, but he has not been engaged in his craft during the period of confinement, nevertheless the confiner shall not be liable for his wages. Of course, if he enjoys his usufruct as when he employs him for some job, he shall be bound to pay him his wages. The same shall be the rule if the confined person dies due to the confiner's fault, as when the confiner confines him in a house having a snake and that bites the confined person, or he confined him in a place having beasts who devour him, then the confiner shall be held liable for the death of the confined person, but not for usurpation or occupation.

Problem # 6. If a person precludes another from holding fast his dispatched animal, from sitting on his bed, or entering his house, or selling his commodities, he shall not be called a usurper, though he shall be one committing violence and oppression due to obstructing him. So if the animal, the bed is damaged, his house is destroyed or the price of his commodities is affected adversely due to his obstruction, the obstructer shall not be held liable for occupation. Whether he shall be held liable in other respects or not, according to the stronger opinion, he shall not be held liable in the last case, that is in case the value of his commodities is affected adversely. As regards the other cases, if the death of the animal, damage to the bed and the destruction of the house were not caused by his obstruction, as when it was due to and Act of God or force majeure in which the obstruction or no obstruction by the

من جهة منعه، فلو هلكت الدابة و تلف الفراش أو انهدمت الدار أو نقصت قيمة المتاع بعد المنع لم يكن على المانع ضمان اليد، و هل عليه ضمان من جهة أخرى أم لا؟ أقواهما العدم في الأخير، و هو ما إذا نقصت القيمة، و أما في غيره فان كان الهلاك و التلف و الانهدام غير مستند إلى منعه بأن كانت بآفة سماوية و سبب قهري لا يتفاوت في ترتبها بين ممنوعية المالك و عدمها لم يكن عليه ضمان، و أما إذا كان مستنداً إليه كما إذا كانت الدابة ضعيفة أو في موضع السباع و كان المالك يحفظها فلما منعه المانع و لم يقدر على حفظها وقع عليها الهلاك ففي الضمان تأمل، لكنه أحوط.

مسألة ٧ ـ استيلاء الغاصب على المغصوب وصيرورته تحت يده عرفا يختلف باختلاف المغصوبات، و الميزان صيرورة الشيء كذلك عدوانا، ففي المنقول غير الحيوان يتحقق بأخذه بيده أو بنقله إليه أو إلى بيته أو دكانه أو أنباره و غيرها مما يكون محرزاً لأمواله ولو كان ذلك لا بمباشرته بل بأمره فلو نقل حمال بأمره كان الآمر غاصبا و كفى في الضمان، بل ولو كان المنقول في بيته أو دكانه مثلاً و طالب المالك و لم يؤده اليه و كان مستولياً على البيت و الدكان يكفي في الضمان، بل لو استولى على الفراش مثلاً ولو بقعوده عليه كفى، و لا يكفي مجرد القعود و قصد الاستيلاء ما لم يتحقق ذلك عرفاً، و هو مختلف في الموارد، كما أن في الحيوان أيضاً هو الميزان، و يكفي الركوب عليه لو أخذ مقوده و زمامه أو سوقه بعد طرد المالك و دفعه أو عدم حضوره إذا كان يمشي بسياقه و يكون منقاداً له، فلو كانت قطيع غنم في الصحراء و معها راعيها فطرده و استولى عليها بعنوان القهر و الانتزاع من مالكها و جعل يسوقها و صار بمنزلة راعيها يحافظها و يمنعها عن التفرق فالظاهر كفايته في تحقق الغصب لصدق الاستيلاء عرفاً، و أما غير المنقول، فيكفي في غصب الدار و نحوها كالدكان و الخان أن يسكنها أو يسكن غيره ممن يأتمر بأمره فيها بعد إزعاج المالك عنها أو عدم حضورها، و كذا لو أخذ مفاتيحها من صاحبها قهراً و كان يغلق الباب و يفتحه و يتردد فيها، و أمّا

obstructer makes no difference, he shall not be held liable for them. If, however, it was caused by his obstruction, as when the animal was weak or it was a placed infested by beasts, and the owner of the animal was protecting it from them, so when the obstructer obstructed him and he could not protect the animal, as a result the animal's death occurred, though there is hesitation in holding the obstructer responsible for, yet it is more cautious to do so.

Problem # 7. The overpowering of a usurped thing by another and its coming under his occupation in the prevalent usage differs with the difference of what is usurped and the extent to which force has been applied in occupying the usurped thing. In case of a mobile thing other than an animal, the usurpation takes place by the usurper's bringing it under his possession or its shifting under his possession, to his house, shop, store, or the like thereby turning the thing into his property, even if it was done not by him personally but by his order. So if a porter carries it by bys his order, the person ordering it shall be called the usurper, and it shall be enough for holding him liable for it. Rather even if the usurped thing lies, for example, in the usurper's house or shop and its owner demands it back from him, but he fails to return it to the owner, while the house or shop was under the owner's control, it shall be enough for his liability. Rather even if he had control over the bed, due to sitting on the bed, it shall suffice [to hold him liable for its damage]. However, his mere sitting and intention of occupying it shall not be sufficient [for his liability] unless it has occurred according to the prevalent usage, and that is different in different situations, as in case of animals too the same extent is applicable. It suffices for riding on it if he takes hold of its leading rope or reins or driving it after pushing away its owner, driving him aside or in his absence when the animal moves on and obeys his orders.

Likewise, if there is a flock of sheep in a jungle and there is a shepherd with them, but a person pushes him away and takes control of the flock by force and turns it away from its owner, and starts driving it and assumes the place of the shepherd, taking case of it and preventing it from dispersing, then apparently it shall be sufficient for the realisation of usurpation due to the application of his occupation according to the prevalent usage.

As regards the immobile things, it is enough for the usurpation of a house or the like as a shop or an inn if he resides in it or some one else resides in it and obeys his orders, after dislodging its owner from it or in his absence. [The same shall be the rule], if he forcibly seizes the keys from its owner and opens and closes it or enters and exits from it.

The same rule shall apply to a garden if it has a gate and enclosure. Otherwise, it shall be sufficient if he enters and exits in it after driving away its owner by bringing it under his own control and effecting some changes in it. The same is the case with a hamlet or a farm. These are all the cases of usurpation of properties.

البستان فكذلك لو كان له باب و حيطان، و إلاّ فيكفي دخوله و التردد فيه بعد طرد المالك بعنوان الاستيلاء و بعض التصرفات فيه، و كذا الحال في غصب القرية و المزرعة، هذا كله في غصب الأعيان، و أما غصب المنافع فانمّا هو بانتزاع العين ذات المنفعة عن مالك المنفعة و جعلها تحت يده بنحو ما تقدم، كما في العين المستأجرة إذا أخذها المؤجر أو غيره من المستأجر، و استولى عليها في مدة الاجارة، سواء استوفى تلك المنفعة التي ملكها المستأجر أم لا.

مسألة ٨ ـ لو دخل الدار و سكنها مع مالكها فان كان المالك ضعيفاً غير قادر على مدافعته وإخراجه فان اختص استيلاؤه و تصرفه بطرف معين منها اختص الغصب و الضمان بذلك الطرف دون غيره، و إن كان استيلاؤه و تصرفاته و تقلباته في أطراف الدار و أجزائها بنسبة واحدة و تساوى يد الساكن مع يد المالك عليها فالظاهر كونه غاصباً للنصف، فيكون ضامناً له خاصة بمعنى أنه لو انهدمت الدار ضمن الساكن نصفها، ولو انهدم بعضها ضمن نصف ذلك البعض، و كذا يضمن نصف منافعها، ولو فرض أن المالك الساكن أزيد من واحد ضمن الساكن الغاصب بالنسبة في الفرض، فان كانا إثنين ضمن الثلث، وإن كانوا ثلاثة ضمن الربع و هكذا، ولو كان الساكن ضعيفا بمعنى أنه لا يقدر على مقاومة المالك و أنه كلما أراد أن يخرجه من داره أخرجه فالظاهر عدم تحقق الغصب و لا اليد و لا الاستيلاء، فليس عليه ضمان اليد، نعم عليه بدل ما استوفاه من منفعة الدار مادام كونه فيها.

مسألة ٩ ـ لو أخذ بمقود الدابة فقادها و كان المالك راكباً عليها فان كان في الضعف و عدم الاستقلال بمثابة المحمول عليها كان القائد غاصبا لها بتمامها، و يتبعه الضمان، ولو كان بالعكس بأن كان المالك الراكب قوياً قادراً على مقاومته ومدافعته فالظاهر عدم تحقق الغصب أصلاً، فلا ضمان عليه لو تلفت الدابة في تلك الحال، نعم لا إشكال في ضمانه لها لو اتفق تلفها بسبب قوده لها، كما يضمن السائق لها لو كان لها جماح فشردت بسوقه فوقعت في بئر أو سقطت

As regards the usurpation of usufructs, it takes place by depriving the owner of the property to which the usufructs belong and bringing it under his control in the manner already explained, as in case of a leased property when it is seized by the lessor or other than him from the lessee and kept under his control during the period of lease, irrespective of the fact whether the usufruct was under the control of the lessor or not.

Problem # 8. If a person enters a house and resides in it along with its owner, and the landlord happens to be a weak person unable remove and expel him, then if he brings under his exclusive control and occupation a particular side of it, the usurpation as well as its liability shall be confined to it to the exclusion of the other sides. If his control and occupation and entrance and exit concern all the sides of the house equally and equal possession with that of the owner, then apparently he shall be considered a usurper of half of it, and so he shall also be liable for half of it, in the sense that if the house is pulled down, the person residing in it shall be liable for half of it. If part of the house is razed to the ground, he shall be liable for half of the portion pulled down, and likewise he shall be liable for half of its usufruct. If suppose there are more than one resident landlords, the residing usurper's liability shall be confined to the same proportion as the supposed number of the owners. If there are two of them, his liability shall be confined to one-third, and if there are four of them, it shall be confined to one-fourth, and so on. If the resident is weak in the sense that he is not able to resist the landlord who can expel him from the house any time he wants, then apparently usurpation, possession and occupation shall not be considered to have taken place. So he shall not be liable for the guarantee of possession.

Of course, he shall be bound to compensate for the exploitation of the usufruct of the house as long as he is [living] in it.

Problem # 9. If a person holds the leading rope of an animal and drives it, while its owner is riding on it. If the owner is weak and his lack of independence is like a load on the back of the animal, the driver shall be considered a complete usurper of the animal, and shall be liable for it. If, however, the case is reverse, so that the owner is the rider strong enough to resist and defend himself against the driver, then apparently no usurpation shall be deemed to have taken place at all. So the driver shall not be held liable in case he dies in that situation.

Of course there is no hesitation in his liability if the death of the animal has taken place due to his driving, as when he is held liable if he is driving an untrained animal and it escapes due to his driving and, for example, slips into a well or falls down from a high altitude and dies or is injured.

Problem # 10. If two persons have participated in usurpation, each of them shall be liable in proportion of his occupation. If it was half, then their liability shall also be half, and so on, irrespective of each them being powerful enough to occupy the property and drive away its owner and overpower him or not;

عن مرتفع مثلاً فتلفت أو عيبت.

مسألة ١٠ ـ لو اشترك إثنان في الغصب ضمن كل منهما للبعض بنسبة الاستيلاء، إن نصفاً فنصف و هكذا، سواء كان كل واحد منهما قو ياً قادراً على الاستيلاء على العين و دفع المالك و القهر عليه أم لا، بل كان كل ضعيفاً بانفراده و انما استيلاؤهما عليها و دفع المالك كان بالتعاضد و التعاون، و سواء كان المالك حاضراً أو غائباً.

مسألة ١١ ـ غصب الأوقاف العامة كالمساجد و المقابر و المدارس و القناطر و الرباطات المعدة لنزول المسافرين و الطرق و الشوارع العامة و نحوها و الاستيلاء عليها و إن كان حراماً و يجب ردها لكن الظاهر أنه لا يوجب ضمان اليد لا عيناً و لا منفعة، فلو غصب مسجداً أو مدرسة أو رباطاً فانهدمت تحت يده من دون تسبيب منه لم يضمن عينها و لا منفعتها، نعم الأوقاف العامة على الفقراء أو غيرهم بنحو وقف المنفعة يوجب غصبها الضمان عيناً و منفعة، فاذا غصب خاناً أو دكاناً أو بستاناً كانت وقفاً على الفقراء مثلاً على أن تكون منفعتها و نماؤها لهم ترتب عليه الضمان كغصب المملوك.

مسألة ١٢ ـ لو حبس حراً لم يضمن لا نفسه و لا منافعه ضمان اليد حتى فيما إذا كان صانعاً، فليس على الحابس أجرة صنعته مدة حبسه، نعم لو كان أجيراً لغيره في زمان فحبسه حتى مضى ضمن منفعته الفائتة للمستأجر، و كذا لو استخدمه و استوفى منفعته كان عليه أجرة عمله، ولو غصب دابة مثلا ضمن منافعها سواء استوفاها أم لا.

مسألة ١٣ ـ لو منع حراً عن عمل له أجرة من غير تصرف و استيفاء لم يضمن عمله، ولم يكن عليه أجرته.

مسألة ١٤ ـ يلحق بالغصب في الضمان المقبوض بالعقد المعاوضي الفاسد أو كالمعاوضي مثل المهر، و يلحق به المقبوض بمثل الجعالة الفاسدة مما لا يكون عقداً، فالمبيع الذي يأخذه المشتري و الثمن الذي يأخذه البائع في البيع الفاسد

rather, even if they were weak independently and they have driven away the owner through cooperation and mutual aid, and irrespective of the owner being present or absent.

Problem # 11. The usurpation of the public endowments like mosques, tombs, schools, bridges, caravansarys built for the caravans to stay in them, roads, public highways, or the like, and their occupation, though it is forbidden and it is obligatory to restore them, but apparently they do not entail the guarantee for occupation, in so far as it concerns the property or its usufruct. So if a person usurps a mosque, a school or a caravansary, and it is destroyed while in his occupation without the usurper's fault, he shall not be held responsible for the destruction of the property as well as its usufruct. Of course, in case of the public endowments for the poor, etc. by way of endowing their usufruct, [their destruction while in the possession of the usurper] shall entail the liability for the property as well as its usufruct. If a person usurps an inn, a shop or a garden that was endowed, for example, for the poor so that its usufruct or growth was to be spent on them, its destruction shall entail liability as in the case of usurpation of any thing owned [by an individual].

Problem # 12. If a person confines a freeman, he shall not be liable for his person or his usufruct as guarantee for occupation, even if he were a craftsman, so that the confiner shall not be liable to pay the wages for his craft for the period of his confinement.

Of course, if a person is hired by another person for some period, and a person confines the hired person, and the period lapses during his confinement, he shall be liable to the hirer for the lapsed period [for which he was hired].

Likewise, if the confiner employs the confined person for a job, and thus utilises his usufruct, he shall be bound to pay the wage of the confined person. So also if a person usurps, for example, an animal, he shall be liable for its usufruct, irrespective of whether he has utilised its usufruct or not.

Problem # 13. If a person obstructs a freeman from doing something for which he gets wages even if does not fulfil the job, the obstructer shall not be held liable for his job, and shall not be bound to pay his wages.

Problem # 14. To the rule for the liability for usurpation belongs what is occupied by a vitiated compensatory contract or the compensation as proper dower. So also the same rule applies for what is occupied through a vitiated *Ju'ālah* in case it is not a contract. So the object of sale received by the buyer and the price received by the seller in a vitiated sale shall have the same guarantee as a usurped thing, irrespective of whether both the parties had knowledge about its being a vitiated transaction or not.

The same is the case with the wages a lessor receives in a vitiated contract of lease. And so is the case with the dower a woman receives in a vitiated contract of marriage, or the *Ja'l* an agent

يكون ضمانها كالمغصوب، سواء كانا عالمين بالفساد أولا، و كذلك الأجرة التي يأخذها المؤجر في الاجارة الفاسدة، و كذا المهر الذي تأخذه المرأة في النكاح الفاسد، و الجعل الذي يأخذه العامل في الجعالة الفاسدة، و أما المقبوض بالعقـد الفاسد غير المعاوضي و أشباهه فليس فيه ضمان، فلو قبض المتهب ما وهب له بالهبة الفاسدة ليس عليه ضمان، و يلحق بالغصب أيضاً المقبوض بالسوم، و المراد به ما يأخذه الشخص لينظر فيه أو يضع عنده ليطلع على خصوصياته لكي يشتريه إذا وافق نظره، فهو في ضمان آخذه، فلو تلف عنده ضمنه.

مسألة ١٥ ـ يجب رد المغصوب الى مالكه مادام باقياً و إن كان في رده مؤونة، بل و إن استلزم رده الضرر عليه، حتى أنه لو أدخل الخشبة المغصوبة في بناء لزم عليه إخراجها و ردها لو أرادها المالك وإن أدى إلى خراب البناء، و كذا إذا أدخل اللوح المغصوب في سفينة يجب عليه نزعه ورده إلا إذا خيف من قلعه الغرق الموجب لهلاك نفس محترمة أو مال محترم لغير الغاصب الجاهل بالغصب، و إلا ففيه تفصيل، و هكذا الحال فيما إذا خاط ثوبه بخيوط مغصوبة، فان للمالك إلزامه بردها، و يجب عليه ذلك و إن أدى إلى فساد ثوبه، و إن ورد نقص على الخشب أو اللوح أو الخيط بسبب إخراجها و نزعها يجب على الغاصب تداركه، هذا إذا يبقى للمخرج و المنزوع قيمة بعد ذلك، و إلا فالظاهر أنه بحكم التالف فيلزم الغاصب بدفع البدل، و ليس للمالك مطالبة العين.

مسألة ١٦ ـ لو مزج المغصوب بما يمكن تميزه و لكن مع المشقة كما إذا مزج الشعير المغصوب بالحنطة أو الدخن بالذرة يجب عليه أن يميزه و يردّه.

مسألة ١٧ ـ يجب على الغاصب مع رد العين بدل ما كانت لها من المنفعة في تلك المدة إن كانت لها منفعة، سواء استوفاها كالدار سكنها و الدابة ركبها أم لا وجعلها معطلة.

مسألة ١٨ ـ لو كانت للعين منافع متعددة و كانت معطلة فالمدار المنفعة

receives in a *Ju'ālah*. A thing occupied through a vitiated non-compensatory contract or its likes has no guarantee. So also a person to whom a free gift (*Hibah*) has been made by a vitiated free gift shall also not be held liable for it [in the event of its destruction or damage]. To usurpation is affiliated what is occupied by *Sowm*, by which is meant a thing a man receives in order to look into it and keeps it with himself in order to know its characteristics so that he may purchase it if he has a favourable opinion about it. Such a thing is under a guarantee of the recipient, so that if it is destroyed [or damaged], he shall be responsible for its indemnity.

Problem # 15. It is obligatory to return the usurped thing to its owner as long as it is there, even if there is some inconvenience in returning it, and even its return entails a loss to the usurper, though he may have placed a usurped timber in a building, he shall be bound to remove it and return it to the owner, even if it leads to the destruction of the building. The same is the case if a person has placed a usurped wooden plank in a boat, he shall be bound to remove it and return it, except when he apprehends that its removal may cause death to an honourable person or an honourable property belonging to a person other than the usurper who is ignorant about the usurpation; otherwise there are detailed rules concerning it.

The same is the case when the usurper has stitched his garment with usurped threads, in which its owner shall be entitled to force him to return the threads, and he shall be bound to do it, even if it leads to damaging his garment. Even if some damage is done to the wood, plank or threads due to their removal, the usurper shall be bound to indemnify it.

This is the case when the removed thing still has some value after its removal; otherwise, it shall be governed by the rule applicable to a destroyer, so that the usurper shall be bound to return its equivalent, and its owner shall not be entitled to demand the return of the usurped thing itself.

Problem # 16. If the usurper has mixed the usurped thing in a way that it is possible to separate it though some with some trouble, as when he mixes barley with wheat or millet with maize, he shall be bound to separate it and return it [to its owner].

Problem # 17. A usurper is bound to return along with the property equivalent of the usufruct that has accrued on it during that period if it has some usufruct, irrespective of whether he has utilised it as in case of a house he has resided in it or in case of an animal has used it for riding, or not, and has left it unused.

Problem # 18. If the property had several benefits, but it had been left unused, the criterion for determining the benefit shall be the amount according to the prevalent usage in respect of the property, and no consideration shall be made for the other possible utilisations of the property. So the usual benefit of a house is dwelling in it, even if it is capable of being used as the store or stable for some animals, etc. So also the usual use of some animals like a horse is riding, while the use of some of them is loading, even if they may be used for turning grinding mill or water- wheels. So the liability in the

المتعارفة بالنسبة الى تلك العين، و لا ينظر إلى مجرد قابليتها لبعض منافع أخر، فنفعة الدار بحسب المتعارف هي السكنى و إن كانت قابلة في نفسها بأن تجعل محرزاً أو مسكناً لبعض الدواب وغير ذلك ، و منفعة بعض الدواب كالفرس بحسب المتعارف الركوب و منفعة بعضها الحمل و إن كانت قابلة في نفسها لأن تستعمل في إدارة الرحى و الدولاب أيضاً، فالمضمون في غصب كل عين هو المنفعة المتعارفة بالنسبة اليها، ولو فرض تعدد المتعارف منها على نحو التبادل كبعض الدواب التي تعارف استعمالها في الحمل و الركوب معاً فان لم يتفاوت أجرة تلك المنافع ضمن تلك الأجرة و إن كانت أجرة بعضها أعلى ضمن الأعلى، فلو فرض أن أجرة الحمل في كل يوم درهمان وأجرة الركوب درهم كان عليه درهمان، و الظاهر أن الحكم كذلك مع الاستيفاء أيضاً، فمع تساوي المنافع في الأجرة كان عليه أجرة ما استوفاه ، و مع التفاوت كان عليه أجرة الأعلى، سواء استوفى الأعلى أو الأدنى.

مسألة ١٩ ـ إن كان المغصوب منه شخصاً يجب الرد إليه أو إلى وكيله إن كان كاملاً، و إلى وليه إن كان قاصراً كما إذا كان صبياً أو مجنوناً، فلو رد في الثاني الى نفس المالك لم يرتفع منه الضمان، و إن كان المغصوب منه هو النوع كما إذا كان المغصوب وقفاً على الفقراء وقف منفعة فان كان له متول خاص يرده اليه، و إلا فيرده الى الولي العام، و هو الحاكم، و ليس له أن يرده إلى بعض أفراد النوع، بأن يسلمه في المثال المذكور الى أحد الفقراء، نعم في مثل المساجد و الشوارع و القناطر بل الرباطات إذا غصبها يكفي في ردها رفع اليد عنها وإبقاؤها على حالها، بل يحتمل أن يكون الأمر كذلك في المدارس، فاذا غصب مدرسة يكفي في ردها رفع اليد عنها والتخلية بينها و بين الطلبة، و الأحوط الرد الى الناظر الخاص لو كان، وإلا فالى الحاكم، هذا إذا غصبها ولم يكن فيها ساكن، و إلا فلا يبعد وجوب الرد الى الطلبة الساكنين فيها حال الغصب إن لم يعرضوا عن حقهم.

usurpation of a property is the usual use in respect of it. If it is supposed that there are several uses of the thing as an alternative, as some of the animals that are used both for loading and riding simultaneously, then if the wages for those uses do not differ, he shall be liable for those wages, but if the wages of some of the uses are higher, he shall be liable for the higher wages. If suppose the wages for loading per day are two Dirhams and the charges for riding is one Dirham, he shall be liable to pay two Dirhams [per day].

Apparently the rule is the same even if he brings the animal to his use.

In case of equality of the benefits, the usurper shall be liable to pay the wages according to the extent he has used the animal, while in case of difference between the wages, he shall be liable to pay the higher wages, irrespective of whether he has used the animal for use having higher wages or for the use having lower wages.

Problem # 19. If it is a person from whom a thing has been usurped, it shall be obligatory to return it to him or his agent if he is mature, otherwise it shall be given to his guardian, if he is incapable, as when he is a minor or a lunatic.

If, in the latter case, the usurper returns the usurped thing t the owner himself, he shall not be absolved of his liability.

If the usurped thing is other than a person, as when the usurped thing is an endowment the usufruct of which is endowed for the poor, in case there is a special custodian for it, it shall be returned to him; otherwise, it shall be returned to the general custodian, namely, the judge. He is not allowed to return it to any of the endowed individuals, as when, in the said example, he delivers it to one of the poor persons.

Of course, in case of examples like mosques, roads, rather caravansarys, when a person usurps them, it is sufficient in returning them to give up their possession and leave them as they are.

Rather it is also like that the same would be case with schools, so that if he usurps a school, it shall be sufficient to give up his possession and vacate it between himself and the students. It is more cautious to return it to the special caretaker, if there is any; otherwise, it must be returned to the judge. This is the case when a person usurps it while there is no one residing in it. Otherwise, it is not far from being obligatory for its return to the students residing in it at the time of usurpation, if they have not already surrendered their right.

Problem # 20. If the usurped thing and the owner are in the place of usurpation, then there is
There is no difficulty. The same is the case when the usurper has shifted it to another place, while the owner is in the place of usurpation. So the usurper is bound to return the usurped property to that place and deliver it to the owner. If, however, the owner is in some place other than the place of usurpation. If

مسألة ٢٠ ـ إذا كان المغصوب و المالك كلا هما في بلد الغصب فلا إشكال، و كذا إن نقل المال الى بلد آخر و كان المالك في بلد الغصب، فانه يجب عليه عود المال إلى ذلك البلد و تسليمه الى المالك، و أما إذا كان المالك في غير بلد الغصب فان كان في بلد المال فله إلزامه بأحد أمرين: إما بتسليمه له في ذلك البلد، و إما بنقله الى بلد الغصب، و أما إن كان في بلد آخر فلا إشكال في أن له إلزامه بنقل المال إلى بلد الغصب، و هل له إلزامه بنقل المال إلى البلد الذي يكون فيه المالك؟ الظاهر أنه ليس له ذلك.

مسألة ٢١ ـ لو حدث في المغصوب نقص و عيب وجب على الغاصب أرش النقصان، و هو التفاوت بين قيمته صحيحاً و قيمته معيبا ورد المعيوب الى مالكه، و ليس للمالك إلزامه بأخذ المعيوب و دفع تمام القيمة، ولا فرق على الظاهر بين ما كان العيب مستقراً و بين ما كان مما يسري و يتزايد شيئاً فشيئاً حتى يتلف المال بالمرة.

مسألة ٢٢ ـ لو كان المغصوب باقياً لكن نزلت قيمته السوقية رده، و لم يضمن نقصان القيمة ما لم يكن ذلك بسبب نقصان في العين.

مسألة ٢٣ ـ لو تلف المغصوب أو ما بحكمه كالمقبوض بالعقد الفاسد و المقبوض بالسوم قبل رده إلى المالك ضمنه بمثله إن كان مثلياً و بقيمته إن كان قيمياً، و تعيين المثلي و القيمي موكول الى العرف، و الظاهر أن المصنوعات بالمكائن في هذا العصر مثليات أو بحكمها، كما أن الحبوبات و الأدهان و عقاقير الأدوية و نحوها مثليات، و أنواع الحيوان و كذا الجواهر و نحوها قيميات.

مسألة ٢٤ ـ إنما يكون مثل الحنطة مثلياً إذا لوحظ أشخاص كل صنف منها على حدة و لم يلاحظ أشخاص صنف مع أشخاص صنف آخر منها مباين له في كثير من الصفات والخصوصيات، فاذا تلف عنده مقدار من صنف خاص من الحنطة يجب عليه دفع ذلك المقدار من ذلك الصنف لا صنف آخر، نعم التفاوت الذي بين أشخاص ذلك الصنف لا ينظر اليه و كذلك الأرز، فان فيه أصنافا

he is in the place where the property lies, he shall have two binding options for the usurper, namely, either to deliver the property in that place, or shift it to the place of usurpation. If, however, he is in some other place, even then there is difficulty, as he shall be entitled to bind the usurper to shift it to the place of usurpation. Whether the owner is entitled to bind the usurper to shift the usurped property to the place where the owner is presently staying, apparently he is not.

Problem # 21. If some defect or blemish has occurred in the usurped property, the usurper shall be liable to indemnify it by the paying the *Arsh*, that is the difference between the price of the unblemished thing and the blemished thing that has been delivered to the owner in a defective condition. The owner cannot compel the usurper to have the blemished thing and pay him its entire price. There is no difference between the thing being in a static condition or when its defect is spreading and increasing bit by bit until it leads to the total destruction of the property.

Problem # 22. If the usurped thing is intact, but its market price has come down, the usurper, nevertheless, shall return the same usurped thing, and shall not be liable to indemnify the fall in its price, if it has not been due to some defect in the usurped thing.

Problem # 23. If the usurped thing or what is considered to be occupied by a vitiated contract or by "*Sowm*" before its return to the owner, he shall be liable to return its substitute if it is one having substitute, or its price if it is one having price.

The determination of whether a thing belongs to the type having substitute or price is to be done according to the prevalent usage.

Apparently the things manufactured by machines these days belong to the type having substitute or are treated as such, as also the cereals, oils and fats, medical drugs and the like also belong to the type having substitute, while all the kinds of animals as well as the precious stones, or the like belong to the type having price.

Problem # 24. Cereals like wheat shall be treated as belonging to the type having equivalent when people consider their varieties separately, and one variety is not considered equal to another having different qualities and characteristics. So if wheat of a particular variety is destroyed while in the possession of a usurper, he shall be bound to return wheat of the same variety and not another variety.

Of course, any negligible difference in the varieties shall not be given any consideration.

The same is the case with rice that has several very different varieties. So its variety called '*Ambar* is not comparable with the one called *Ḥavezāvī*, or any other variety. So if an amount of the rice

متفاوتة جداً، فأين العنبر من الحويزاوي أو غيره؟! فاذا تلف عنده مقدار من العنبر يجب عليه دفع ذلك المقدار منه لا من غيره، و كذلك الحال في التمر و أصنافه والأدهان وغير ذلك مما لا يحصى.

مسألة ٢٥ ـ لو تعذر المثل في المثلي ضمن قيمته، و إن تفاوتت القيمة وزادت و نقصت بحسب الأزمنة بأن كان له حين الغصب قيمة و في وقت تلف العين قيمة و يوم التعذر قيمة و اليوم الذي يدفع القيمة الى المغصوب منه قيمة فالمدار هو الأخير، فيجب عليه دفع تلك القيمة، فلو غصب مناً من الحنطة كان قيمتها درهمين فأتلفها في زمان كانت الحنطة موجودة و كانت قيمتها ثلاثة دراهم ثم تعذرت و كانت قيمتها أربعة دراهم ثم مضى زمان وأراد أن يدفع القيمة من جهة تفريغ ذمته و كانت قيمة الحنطة في ذلك الزمان خمسة دراهم يجب دفع هذه القيمة.

مسألة ٢٦ ـ يكفي في التعذر الذي يجب معه دفع القيمة فقدانه في البلد و ما حوله مما ينقل منه إليه عادة.

مسألة ٢٧ ـ لو وجد المثل بأكثر من ثمن المثل وجب عليه الشراء و دفعه الى المالك ما لم يؤد الى الحرج.

مسألة ٢٨ ـ لو وجد المثل و لكن تنزلت قيمته لم يكن على الغاصب إلا إعطاؤه، و ليس للمالك مطالبته بالقيمة و لا بالتفاوت، فلو غصب مناً من الحنطة في زمان كانت قيمتها عشرة دراهم و أتلفها و لم يدفع مثلها قصوراً أو تقصيراً إلى زمان قد تنزلت قيمتها و صارت خمسة دراهم لم يكن عليه إلا إعطاء منّ من الحنطة، و لم يكن للمالك مطالبة القيمة و لا مطالبة خمسة دراهم مع منّ من الحنطة، بل ليس له الامتناع عن الأخذ فعلاً و إبقاؤها في ذمة الغاصب إلى أن ترتقي القيمة إذا كان الغاصب يريد الأداء و تفريغ ذمته فعلاً.

مسألة ٢٩ ـ لو سقط المثل عن المالية بالمرة من جهة الزمان أو المكان فالظاهر أنه ليس للغاصب إلزام المالك بأخذ المثل، و لا يكفي دفعه في ذلك الزمان أو

belonging to the *'Ambar* variety is destroyed while in the possession of the usurper, he shall be bound to return the rice of the same variety and not of another variety. The same is the case with the dates and its varieties and oils and fats, etc. that are innumerable.

Problem # 25. If a person is not able to return an equivalent of the usurped thing, he shall be liable to pay its price. If there is difference in its price that has gone up and down on various occasions, as at the time of the usurpation, at the time of destruction, at the time of his inability to return the equivalent and on the day its price is returned to the person from whom it has been usurped. The criterion shall be the latest, so that the usurper shall be bound to return that price.

If a person has usurped a Maund of wheat having a current price of two Dirhams, and then it is destroyed at a time having a price of three Dirhams, and subsequently he becomes unable to return its equivalent when its price was four Dirhams, then after the passage of time, he intends to pay its price in order to absolved of its liability, when its price was five Dirhams, he shall be bound to pay this last price.

Problem # 26. The unavailability of the equivalent of the usurped thing in the place or from where it is supplied is sufficient for the inability [of the usurper to return the equivalent of the usurped thing] rendering him liable to pay its price.

Problem # 27. If the usurper finds the equivalent of the usurped thing at a price higher than its proper one, he shall be bound to purchase it and deliver it to the owner when it is not troublesome.

Problem # 28. If the usurper finds the substitute of the usurped thing, but its price has fallen, he shall be bound to deliver it to the owner, and the owner shall not be entitled to demand its price.

If a man has usurped a Maund of wheat at a time when its price was ten Dirhams, and then he destroys it, and fails to return its substitute due to his omission or commission until the time its price has fallen to five Dirhams, he shall not be bound but to return one Maund of wheat, and the owner shall neither be entitled to demand its price from him nor to demand five Dirhams along with a Maund of wheat. Rather the owner shall not be entitled to refuse to get its immediate delivery and let it remain in the possession of the usurper till the rise in its price when the usurper intends to deliver it and absolve himself of the liability.

Problem # 29. If the price of the substitute falls all of a sudden due to time or place, then apparently the usurper shall not be entitled to compel the owner to receive the substitute, and it shall not be sufficient to deliver it at that time or place to absolve the usurper from his liability if he is not willing to accept it.

If a person usurps ice in summer and destroys it, and intends to deliver it to the owner its equivalent in winter, or usurps a water-skin in a jungle and intends to return it to the owner at the bank of a river, he shall not be entitled to do so and the owner shall be entitled to refuse to receive it, and shall be entitled to wait for another time and place, then he may demand its substitute having that price.

المكان في ارتفاع الضمان لو لم يرض به المالك ، فلو غصب ثلجاً في الصيف و أتلفه و أراد أن يدفع الى المالك مثله في الشتاء أو قربة ماء في مفازة فأراد أن يدفع إليه قربة ماء عند الشط ليس له ذلك و للمالك الامتناع، فله أن يصبر و ينتظر زماناً أو مكاناً آخر فيطالبها بالمثل الذي له القيمة، و له أن يطالب الغاصب بالقيمة فعلاً كما في صورة تعذر المثل، و حينئذ فهل يراعى قيمته في زمان الغصب و مكانه؟ المسألة مشكلة، فالأحوط التخلص بالتصالح.

مسألة ٣٠ ـ لو تلف المغصوب و كان قيمياً كالدواب و الثياب ضمن قيمته، فان لم يتفاوت قيمته في الزمان الذي غصبه مع قيمته في زمان تلفه فلا إشكال، و إن تفاوتت بأن كانت قيمته يوم الغصب أزيد من قيمته يوم التلف أو العكس فهل يراعى الأول أو الثاني؟ فيه قولان مشهوران، و هنا وجه آخر، و هو مراعاة قيمة يوم الدفع، والأحوط التراضي فيما به التفاوت بين يوم الغصب إلى يوم الدفع، هذا إذا كان تفاوت القيمة من جهه السوق و تفاوت رغبة الناس، و أما إن كان من جهة زيادة و نقصان في العين كالسمن و الهزال فلا إشكال في أنه يراعى أعلى القيم و أحسن الأحوال، بل لو فرض أنه لم يتفاوت قيمة زماني الغصب و التلف من هذه الجهة لكن حصل فيه ارتفاع بين الزمانين ثم زال ضمن ارتفاع قيمته الحاصل في تلك الحال، مثل ما لو كان الحيوان هازلاً حين الغصب ثم سمن ثم عاد إلى الهزال و تلف، فانه يضمن قيمته حال سمنه.

مسألة ٣١ ـ لو اختلف القيمة باختلاف المكان كما إذا كان المغصوب في بلد الغصب بعشرة و في بلد التلف بعشرين و في بلد الأداء بثلاثين فلا يترك الاحتياط المتقدم في المسألة السابقة.

مسألة ٣٢ ـ كما أنه عند تلف المغصوب يجب على الغاصب دفع بدله الى المالك مثلاً أو قيمةً كذلك فيما إذا تعذر على الغاصب عادة تسليمه، كما اذا سرق أو دفن في مكان لا يقدر على إخراجه، أو أبق العبد أو شردت الدابة و نحو ذلك، فانه يجب عليه إعطاء مثله أو قيمته مادام كذلك ، و يسمى ذلك البدل بدل

He may also demand the price now from the usurper as is the case in his inability to return its substitute. In such case whether he shall consider its price as it was at the time of the usurpation and its place, it is a difficult issue, and so it is more cautious to reach a compromise.

Problem # 30. If a usurped thing is destroyed, and it belonged to the type having a price, as animals and garments, the usurper shall be bound to indemnify it. If there is no difference between its prices as at the time he usurped it and at the time he has destroyed it, there shall be no problem. If, however, they differ, so that the price on the day of usurpation was higher that on the day of its destruction, or vice versa, then which of the two shall be given consideration, the former or the latter; there are two well-received opinions on this issue, and there is another alternative too, and that is the consideration given to the price at the time of its delivery [to the owner]. It is more cautious to reach mutual consent on the difference between the prices as they were at the time of usurpation and at the time of delivery [to the owner]. This is the case when there was difference in the price due to the fluctuation in the market and the demand of the people. If it was due to the rise and fall in the property as its fatness or thinness, then there is no problem, as consideration shall be made for the highest price and the best condition.

If, however, it is supposed that there was no difference in the prices of both the times, namely, at the time of usurpation and destruction due to this reason, but the rise had occurred and then fell, he shall be liable to pay the price as it rose in that condition, as when an animal was thin at the time of usurpation, then became fat and again became thin and died, in such case, the usurper shall be liable to pay his price at the time of fatness.

Problem # 31. If the price of the usurped thing differs with the difference in place, as it is ten [Dirhams] at the place of usurpation, twenty at the place of destruction and thirty at the place of payment, then caution as mentioned in the preceding Problem must not be given up.

Problem # 32. As in the event of destruction of the usurped thing a usurper is bound to compensate it to the owner by delivering its substitute or it price, the same shall be the rule if he is not possible for the usurper usually to deliver the usurped thing, as when it is stolen or is buried at a place from which it is not possible to take it out, or when the slave has escaped, or the animal has run away, or the like, in all these cases the usurper shall be bound to deliver its substitute or its price as long as the conditions remain so. This is called *"Badal al-Ḥaylūlah"*. In such a case the owner becomes the owner of the substitute along with the ownership of the usurped thing, so that the substitute is returned when it is possible [for the usurper] to deliver and return the usurped thing [to the owner].

Problem # 33. If the substitute has some growth and benefits during that period, they shall belong to the person whose property has been usurped. Of course, the growth affiliated with the property, like

الحيلولة، و يملك المالك البدل مع بقاء المغصوب في ملكه، و إذا أمكن تسليم المغصوب ورده يسترجع البدل.

مسألة ٣٣ ـ لو كان للبدل نماء و منافع في تلك المدة كان للمغصوب منه، نعم نماؤه المتصل كالسمن يتبع العين، فاذا استرجعها الغاصب استرجعها بنمائها، و أما المبدل فلما كان باقياً على ملك مالكه فنماؤه و منافعه له، لكن الغاصب لا يضمن منافعه الغير المستوفاة في تلك المدة على الأقوى.

مسألة ٣٤ ـ القيمة التي يضمنها الغاصب في القيميات و في المثليات عند تعذر المثل هو نقد البلد من الذهب و الفضة المضروبين بسكة المعاملة و غيرهما مما هو نقد البلد كالأوراق النقدية، و هذا هو الذي يستحقه المغصوب منه، كما هو كذلك في جميع الغرامات و الضمانات، فليس للضامن دفع غيره إلا بالتراضي بعد مراعاة قيمة ما يدفعه مقيساً الى نقد البلد.

مسألة ٣٥ ـ الظاهر أن الفلزات و المعادن المنطبعة كالحديد و الرصاص و النحاس كلها مثلية حتى الذهب و الفضة مضروبين أو غير مضروبين، و حينئذ تضمن جميعها بالمثل، و عند التعذر تضمن بالقيمة كسائر المثليات المتعذر المثل، نعم في خصوص الذهب و الفضة تفصيل، و هو أنه إذا قوّم بغير الجنس كما إذا قوّم الذهب بالدرهم أو قوّم الفضة بالدينار فلا إشكال، وأما إذا قوّم بالجنس بأن قوّم الفضة بالدرهم أو قوّم الذهب بالدينار فان تساوى القيمة و المقوّم وزناً كما اذا كانت الفضة المضمونة المقوّمة عشرة مثاقيل فقوّمت بثمانية دراهم و كان وزنها أيضاً عشرة مثاقيل فلا إشكال أيضاً، و إن كان بينهما التفاوت بأن كانت الفضة المقوّمة عشرة مثاقيل مثلاً و قد قوّمت بثمانية دراهم وزنها ثمانية مثاقيل فيشكل دفعها غرامة عن الفضة، لاحتمال كونه داخلاً في الربا فيحرم، كما أفتى به جماعة، فالأحوط أن يقوّم بغيرالجنس بأن يقوّم الفضة بالدينار والذهب بالدرهم حتى يسلم من شبهة الربا.

مسألة ٣٦ ـ لو تعاقبت الأيادي الغاصبة على عين ثم تلفت بأن غصبها

fatness, shall follow the property. So when the usurper returns the usurped property, he shall do it along with the growth. As regards the usurped property, as it is still a property of the owner, so its growth and benefits shall also belong to him. According to the stronger opinion, the usurper shall, however, not be responsible for the benefits not utilised by him during that period.

Problem # 34. The price guaranteed by the usurper for the usurped thing to be compensated by price or a substitute, in the even of the inability of the usurper to return its substitute shall pay in the cash of gold or silver moulded into coins for [financial] transaction current in the place, or any other form as the currency notes. This is to what the person whose property has been usurped is entitled to, as is the case in all fines and guarantees. The guarantor, likewise, is not allowed to return anything else except with the mutual agreement after considering the price of what is to be returned commensurate with the currency of the place.

Problem # 35. Apparently the moulded metals and minerals as iron, lead and copper have all substitutes, including even gold and silver moulded into coins or otherwise, in case of all these one is liable to return the substitute, and in case of inability, he is required to pay in the form of their price as is the case of such other things.

Of course, in the case of gold and silver there are detailed rules, namely, that when they are evaluated in other than their own substance, as gold is evaluated in Dirhams, or Silver is evaluated in Dinars, then there is no difficulty.

If, however, they are evaluated in their own substance, as silver is evaluated in Dirhams and gold in Dinars, then if their price and evaluated weight are equal, as when the evaluated silver is ten *Mithqals* and it has been evaluated in eight Dirhams, while its weight was also ten *Mithqals*, then there is no problem.

If there is some difference between them, as when the evaluated silver is, for example, ten *Mithqāls* and it has been evaluated in eight Dirhams having a weight of eight *Mithqāls*, then it shall be difficult to pay the deficiency of the silver, as there is likelihood of the transaction falling under *Ribā*, and so it shall be forbidden, according to the verdict of a group of jurists. It is, therefore, more cautious to evaluate them in another substance so that silver is evaluated in Dinars and gold in Dirhams in order to be safe from the suspicion of falling under *Ribā*.

Problem # 36. If a thing is usurped by several persons one after the other, and then it is destroyed, so that one of them usurped it from its owner, then another person usurped it from the usurper, then a third person usurped it from the second usurper, and so on. Then it is destroyed. In such a case all of them shall be held liable for it. So the owner shall be entitled to have recourse against each of them for the substitute for a thing having substitute or price, or against more than once to be divided equally or differently, even in case they are, suppose, ten usurpers, he may have recourse against all of them and may receive one-tenth of the substitute to which he is

شخص من مالكها ثم غصبها من الغاصب شخص آخر ثم غصبها من الثاني شخص ثالث و هكذا ثم تلفت ضمن الجميع، فللمالك أن يرجع ببدل ما له من المثل أو القيمة على كلّ واحد منهم، وعلى أكثر من واحد بالتوزيع متساو ياً أو متفاوتاً، حتى أنه لو كانوا عشرة مثلاً له أن يرجع على الجميع و يأخذ من كل منهم عشر ما يستحقه من البدل، و له أن يأخذ من واحد منهم النصف و الباقي من الباقين بالتوزيع متساو ياً أو بالتفاوت، هذا حكم المالك معهم، وأما حكم بعضهم مع بعض فعلى الغاصب الأخير الذي تلف المال عنده قرار الضمان، بمعنى أنه لو رجع عليه المالك و غرمه لم يرجع هو على غيره بما غرمه، بخلاف غيره من الأيادي السابقة، فان المالك لو رجع على واحد منهم فله أن يرجع على الأخير الذي تلف المال عنده، كما أن لكل منهم الرجوع على تاليه و هو على تاليه و هكذا إلى أن ينتهي إلى الأخير.

مسألة ٣٧ ـ لو غصب شيئاً مثلياً فيه صنعة محللة كالحلي من الذهب و الفضة و كالآنية من النحاس وشبهه فتلف عنده أو أتلفه ضمن مادته بالمثل وصنعته بالقيمة، فلو غصب قرطاً من ذهب كان وزنه مثقالين و قيمة صنعته و صياغته عشرة دراهم ضمن مثقالين من ذهب بدل مادته و عشرة دراهم قيمة صنعته، و يحتمل قريباً صيرورته بعد الصياغة و بعد ما عرض عليه الصنعة قيمياً، فيقوّم القرط مثلاً بمادته و صنعته، و يعطى قيمته السوقية و الأحوط التصالح، و أما احتمال كون المصنوع مثلياً مع صنعته فبعيد جداً نعم لا يبعد ذلك بل قريب جداً في المصنوعات التي لها أمثال متقاربة، كالمصنوعات بالمكائن و المعامل المعمولة في هذه الأعصار من أنواع الظروف و الأدوات و الأثواب و غيرها، فتضمن كلها بالمثل مع مراعاة صنفها.

مسألة ٣٨ ـ لو غصب المصنوع و تلفت عنه الهيئة و الصنعة فقط دون المادة رد العين و عليه قيمة الصنعة، و ليس للمالك إلزامه باعادة الصنعة، كما أنه ليس عليه القبول لو بذله الغاصب و قال: إني أصنعه كما كان سابقاً.

entitled, or may have half from one of them, and the rest from the rest equally or differently. This is the rule concerning the owner's right against the usurpers.

As regards the rule relating to the usurpers in relation to one another, the last usurper in whose possession the property has been destroyed shall be finally responsible for it, in the sense that if the owner has recourse to the last usurper, and he indemnifies him, he shall not be entitled to have recourse against the others for what he has indemnified contrary to those preceding him.

So if the owner has recourse to any of them for indemnity, he shall be entitled to have recourse against the last usurper in whose possession the property has been destroyed, as also each of them shall be entitled to have recourse against the next, and the next against the next, till they reach the last one.

Problem # 37. If a person usurps something that has a substitute involving some lawful craft in it as jewellery of gold or silver or utensils of copper or the like, and it is destroyed while in his possession or he destroys it, he shall be responsible for the material as well as the wages for manufacturing it.

So if he usurps a ring of gold weighing two *Mithqāls* while the wages of manufacturing and moulding it are ten Dirhams, he shall be liable for two *Mithqāls* of gold as a substitute for its material and ten Dirhams for its manufacture.

It is likely that after its moulding it and working on it, it may enter the category of the things evaluated by their value. So, for example, firstly the material and wages for its manufacture shall be evaluated, and its price shall be paid after considering its market price, and so it is better to reach a compromise. But considering it in the category of things having substitute after having been manufactured is very far from likely.

Of course, it is not far from likely, rather it is very close to likelihood to consider it in the manufactured things that have close substitutes, as the things manufactured by machines and ordinary factories in the present days including various kinds of utensils, tools, garments, etc. in whose case the usurper shall be liable to indemnify them keeping in view their respective categories.

Problem # 38. If a person usurps a manufactured thing, and only its structure and work on it are destroyed excluding its material, the usurper shall return the thing itself and shall be liable to pay the wages for the work on it, and the owner shall not be entitled to compel him to turn it in its original shape, in the same way as the owner is entitled to reject the offer of the usurper if he says: "I shall turn it in the same shape it was."

Problem # 39. If the usurped thing of the category that can be substituted has some unlawful craft on it, as is the case with the instruments for gambling and entertainment or the like, the usurper shall not be liable for the craft on it, regardless of the fact whether he destroys the craft on them or the instruments along with the craft on them. So he shall return it if it is there or its substitute if it is destroyed, and shall not be liable for its shape and craft.

مسألة ٣٩ ـ لو كانت في المغصوب المثلي صنعة محرمة غير محترمة كما في آلات القمار و الملاهي ونحوهالم يضمن الصنعة سواء أتلفها خاصة أو مع ذيها، فيرد المادة لو بقيت و عوضها لو تلفت، وليس عليه شيء لأجل الهيئة و الصنعة.

مسألة ٤٠ ـ إن تعيب المغصوب في يد الغاصب كان عليه أرش النقصان، و لا فرق في ذلك بين الحيوان و غير الحيوان، نعم اختص العبيد و الاماء ببعض الأحكام و تفاصيل لا يسعها المقام.

مسألة ٤١ ـ لو غصب شيئين تنقص قيمة كل واحد منهما منفرداً عنها فيما إذا كانا مجتمعين كمصراعي الباب و الخفين فتلف أحدهما أو أتلفه ضمن قيمة التالف مجتمعاً، ورد الباقي مع ما نقص من قيمته بسبب انفراده فلو غصب خفين كان قيمتها مجتمعين عشرة و كان قيمة كل منهما منفرداً ثلاثة فتلف أحدهما عنده ضمن التالف بقيمته مجتمعاً وهي خمسة، وردّ الآخر مع ما ورد عليه من النقص بسبب انفراده و هو إثنان، فيعطي للمالك سبعة مع أحد الخفين، ولو غصب أحدهما و تلف عنده ضمن التالف بقيمته مجتمعاً و هي خمسة في الفرض المذكور، و هل يضمن النقص الوارد على الثاني و هو إثنان حتى تكون عليه سبعة أم لا؟ فيه وجهان بل قولان، لا يخلو أولهما من رجحان.

مسألة ٤٢ ـ لو زادت بفعل الغاصب زيادة في العين المغصوبة فهي على أقسام ثلاثة: أحدها ـ أن تكون أثراً محضاً كخياطة الثوب بخيوط المالك و غزل القطن و نسج الغزل و طحن الطعام و صياغة الفضة و نحو ذلك، ثانيها ـ أن تكون عينية محضة كغرس الأشجار والبناء في الأرض البسيطة و نحو ذلك، ثالثها ـ أن تكون أثراً مشوباً بالعينية كصبغ الثوب و نحوه.

مسألة ٤٣ ـ لو زادت في العين المغصوبة ما يكون أثراً محضاً ردها كما هي، و لا شيء له لأجل تلك الزيادة و لا من جهة أجرة العمل، و ليس له إزالة الأثر وإعادة العين إلى ما كانت بدون إذن المالك حيث أنه تصرف في مال الغير بدون إذنه، بل لو أزاله بدون إذنه ضمن قيمته للمالك و إن لم يرد نقص على العين، و

Problem # 40. If a usurped thing is damaged while in the possession of the usurper, he shall be liable to pay its *Arsh*. In such case, there is no difference between the usurped object being an animal or otherwise. Of course, there are special rules concerning the slaves and slave-girls, and their details cannot be given here.

Problem # 41. If a person usurps two things the individual value of which is less than their total value, as the two leaves of a door or each of the pair of shoes, and one of them is destroyed or he destroys it, he shall be liable to pay the price of both, and shall return the one left behind along with the loss in its price due to its being single. So if a person usurps a pair of shoes the price of both the shoes being ten [Dirhams] and of each of them being ten [Dirhams], and one of the pair is destroyed while in his possession, he shall be liable to pay the price of both, namely, five [Dirhams], and shall return the other one despite the defect in its being single, the defect being the pair. So he shall pay seven [Dirhams] to the owner with one of the two shoes. If, however, he usurps a single shoe of the pair, and it is destroyed while in his possession, he shall be liable to pay the price of both of them, namely, five [Dirhams] as per example mentioned. Whether he shall be liable for the defect reaching the other, as they are a pair, and so liable for the payment of seven [Dirhams], or not, there are two alternatives, rather two opinions on this point, the first not being without preference.

Problem # 42. If some excess takes place in the usurped thing due to the act of the usurper, being of three kinds; firstly, it may create only some effect on it as stitching of a garment with the owner's thread, carding the cotton or weaving with it, turning the grain into flour, moulding the silver, etc.; secondly, mere addition of some thing in it, as plantation or construction on a flat land, or the like; and thirdly, it may create an effect on it that may have a sign of another thing, as dying a cloth, or the like.

Problem # 43. If only a mere effect has been created on the usurped thing, the usurper may return it as it is, and he shall be under no other liability for that excess or wages for the work on it, and he shall neither be required to remove the effect, nor to revert the thing to its original condition without the owner's permission, as it amounts to bringing change in the property of another without his permission. Rather, if he removes the effect without the owner's permission, he shall be liable to pay him its price, even if it has not brought any defect in the property itself, but the owner shall be entitled to compel the usurper to remove the effect and revert the thing to its original condition, if there was any rational reason in it, in which case the usurper shall not be liable to indemnify the work on it.

Of course, if some damage has been done to the usurped thing, he shall be liable for the payment of *Arsh* for the damage.

Problem # 44. If a person usurps a land and cultivates it or plants trees on it, the farm and the trees, as

للمالك إلزامه بازالة الأثر و إعادة الحالة الأولى للعين إذا كان فيه غرض عقلائي، و لا يضمن الغاصب حينئذ قيمة الصنعة، نعم لو ورد نقص على العين ضمن أرش النقصان.

مسألة ٤٤ ـ لو غصب أرضاً فزرعها أو غرسها فالزرع أو الغرس و نماؤهما للغاصب، و عليه أجرة الأرض مادامت مزروعة أو مغروسة. و يلزم عليه إزالة غرسه وزرعه و إن تضرر بذلك ، و عليه أيضاً طمّ الحفر و أرش النقصان إن نقصت الأرض بالزرع و القلع إلا أن يرضى المالك بالبقاء مجاناً أو بالأجرة، ولو بذل صاحب الأرض قيمة الغرس أو الزرع لم يجب على الغاصب إجابته، و كذا لو بذل الغاصب أجرة الأرض أو قيمتها لم يجب على صاحب الأرض قبوله، ولو حفر الغاصب في الأرض بئراً كان عليه طمها مع طلب المالك، و ليس له طمها مع عدم الطلب فضلاً عما لو منعه، ولو بنى في الأرض المغصوبة بناءً فهو كما لو غرس فيها، فيكون البناء للغاصب إن كان أجزاؤه له، و للمالك إلزامه بالقلع، فحكمه حكم الغرس في جميع ما ذكر.

مسألة ٤٥ ـ لو غرس أو بنى في أرض غصبها و كان الغراس و أجزاء البناء لصاحب الأرض كان الكل له، و ليس للغاصب قلعها أو مطالبة الأجرة، و للمالك إلزامه بالقلع و الهدم إن كان له غرض عقلائي في ذلك، و على الغاصب أرش نقص الأرض و طمّ حفرها.

مسألة ٤٦ ـ لو غصب ثوباً و صبغه بصبغه فان أمكن إزالته مع بقاء مالية له كان له ذلك، و ليس لمالك الثوب منعه، كما أن للمالك إلزامه به، ولو ورد نقص على الثوب بسبب إزالة صبغه ضمنه الغاصب، ولو طلب مالك الثوب من الغاصب أن يملكه الصبغ بقيمته لم يجب عليه إجابته كالعكس بأن يطلب الغاصب منه أن يملكه الثوب، هذا إذا أمكن إزالة الصبغ، و أما إذا لم يمكن الازالة أو تراضيا على بقائه و كان للصبغ عين متمولة اشتركا في قيمة الثوب المصبوغ بالنسبة، فلو كانت قيمة الثوب قبل الصبغ تساوي قيمة الصبغ كانت

well as their product, shall belong to the usurper, and he shall be liable to pay the rent for the land as long as the farm and trees are on the land. He shall be bound to remove the farm and trees from the land, even if it entails loss to him. He shall also be bound to fill the pits and pay *Arsh* if he has damaged the land by the cultivation or uprooting the plants, except when the owner agrees with their retention gratis or against payment. If the owner offers the price of the farm and trees, the usurper shall not be bound to accept it. Likewise, if the usurper offers rent or price of the land, the owner shall not be bound to accept it.

If the usurper has dug a well in the land, he shall be bound to fill it if demanded by the owner, but he shall not be entitled to fill it without his demand, let alone when he forbids him to do so.

If the usurper has constructed a building on the usurped land, it shall be as if he has planted trees on it. So the building shall belong to the usurper, if its parts belong to him. The owner shall be entitled to demand him to demolish it. So its rules are similar to those in case of planting trees in all respects mentioned by us.

Problem # 45. If a usurper plants trees or constructs a building on the land he has usurped, while the plants and construction material belonged to the owner of the land, they shall all belong to the owner, and the usurper shall not be entitled to uproot or demolish them or demand a remuneration for them, while the owner shall be entitled to demand their uprooting or demolition if there is some reasonable cause for it. The usurper shall also be liable for the payment of the *Arsh* and filling the pits.

Problem # 46. If a person usurps a cloth and dyes it with his own dye, then if it is possible to remove its dye retaining its value, he shall be entitled to do it, and the owner shall not be entitled to forbid him to do so.

At the same time the owner of the cloth shall be entitled to compel the usurper to remove the dye from the cloth.

If, however, some defect is caused due to removing the dye, the usurper shall be liable to indemnify him. If the owner demands the return of the dyed cloth against payment of the price of the dye, the usurper shall not be bound to accept it, like the reverse when the usurper demands him to allow him to own the dyed cloth.

This is the case when it is possible to remove the dye [from the cloth]. If, however, it is not possible to remove the dye, or both of them agree to leave it as it is, and the dye contains something valuable, both shall share the price of the dyed cloth proportionately.

If the price of the cloth before dying equals the price of the dye, they shall share it by half and

بينهما نصفين، وإن تفاوتت كان التفاوت لصاحب الثوب أو الصبغ، هذا إذا بقيت قيمتهما على ما هما عليها الى ما بعد الصبغ، و إلا فان زادت قيمة الثوب و نقصت قيمة الصبغ لأجله فالزيادة لصاحب الثوب، ولو انعكس ضمن الغاصب أرش نقص الثوب، ولو زادت قيمة الثوب بالصبغ و بقيت قيمة الصبغ على ما هو عليه كانت الزيادة لصاحب الثوب ولو انعكس فالزيادة للغاصب.

مسألة ٤٧ ـ لو صبغ الثوب المغصوب بصبغ مغصوب و كانت للصبغ بعده عين متمولة بقيت كل منهما في ملك صاحبه، و حصلت الشركة لو بيعا بين صاحبيهما بنسبة قيمتهما، و لا غرامة على الغاصب إن لم يرد نقص عليهما، و إن ورد ضمنه لمن ورد عليه.

مسألة ٤٨ ـ لو مزج الغاصب المغصوب بغيره أو امتزج في يده بغير اختياره مزجاً رافعاً للتميز بينهما فان كان بجنسه و كانا متماثلين ليس أحدهما أجود من الآخر أو أردى تشاركا في المجموع بنسبة ماليهما، و ليس على الغاصب غرامة بالمثل أو القيمة، بل الذي عليه تسليم المال و الاقدام على الافراز و التقسيم بنسبة المالين أو البيع و أخذ كل واحد منهما حصته من الثمن كسائر الأموال المشتركة، و إن خلط المغصوب بما هو أجود أو أردى منه تشاركا أيضاً بنسبة المالين إلا أن التقسيم و توزيع الثمن بينهما بنسبة القيمة، فلو خلط منّاً من زيت قيمته خمسة بمن منه قيمته عشرة كان لكل منهما نصف المجموع، لكن إذا بنيا على القسمة يجعل ثلاثة أسهم، و يعطى لصاحب الأول سهم و لصاحب الثاني سهمان، و إذا باعاه يقسّم الثمن بينهما أثلاثاً، و الأحوط في مثل ذلك أعني اختلاط مختلفي القيمة من جنس واحد البيع و توزيع الثمن بنسبة القيمة لا التقسيم بالتفاضل بنسبتها من جهة شبهة لزوم الربا في الثاني كما قال به جماعة، هذا إذا مزج المغصوب بجنسه ،وأما إذا اختلط بغير جنسه فان كان فيما يعدّمعه تالفاً كما إذا اختلط ماء الورد المغصوب بالزيت ضمن المثل، و إن لم يكن كذلك كما لو خلط دقيق الحنطة بدقيق الشعير أو خلط الخل بالعسل فالظاهر أنه بحكم الخلط بالأجود أو

half. In case the prices differ, the difference shall belong to the master of the cloth or the dye. This is the case when the prices of both remain the same after dying it. Otherwise, if the price of the cloth has increased [due to dying], and that of the dye decreased due to it, the excess shall belong to the owner of the cloth. If, however, it is otherwise, the usurper shall be liable for the payment of the *Arsh* for the defect caused to the cloth. If the price of the cloth has increased due to dying the cloth, while the price of the dye remains the same as it was, the excess shall belong to the master of the cloth. If the case is otherwise, the excess shall go to the usurper.

Problem # 47. If a person dyes a usurped cloth with a usurped dye, and the cloth remains valuable even after dying, the dye and cloth shall belong to their actual masters. In case of sale of both, both of them shall share the price proportionately. If both the dye and the cloth have not been damaged, the usurper shall have no liability whatsoever. In case of damage, he shall be liable to the master of the thing damaged.

Problem # 48. If the usurper has mixed the usurped thing or it has mixed up while in this possession without his control in a way that it is possible to separate both, then if the thing mixed belongs to the same category and both of them can be substituted, and neither of them was of a higher or lower quality than the other, they shall share the mixture proportionately, and the usurper shall be under no liability for substitution or price. Rather he shall be the person charged with the delivery of the property and act for separation and division of both the mixed things proportionately, or sell the mixture and let each of them take his share from the sale proceeds like all the joint properties.

If the usurper has mixed the usurped thing with what is of a higher or lower quality, even then both their masters shall share the mixture proportionately, except that division or distribution of the price between them shall be in portion to price of each of the things mixed. So if he has mixed a Maund of oil worth five [Dirhams] with a Maund of another one worth ten [Dirhams], each of them shall receive half of the mixture. In case of division, it shall be divided into three parts, the first shall get one and the second two. If it is sold, its sale proceeds shall also be divided between them in the same proportion by dividing the price into three parts. It is more cautious in such a case, namely, in case of mixture of two things of the same kind but having different values to sell the mixture and divide the sale proceeds according to their respective prices proportionately and not dividing the mixture in proportion to their respective prices, in view of the suspicion of its falling under the rules of *Ribā*, as claimed by a group of jurists. This is the case when the usurped thing is mixed with a thing of its own category.

In case, however, the usurped thing is nixed with something of another category, if it is something that is considered to destroy it, as when the usurper mixing the rose water [*aqua rosae*] with oil, the usurper shall be liable for the payment of their substitute. If it was not so, as when the usurper mixes the wheat flour with barley flour or vinegar with honey, then apparently it shall be governed by the rule of mixing it with something of a higher or lower quality, but of the same category. So they shall share in the mixture proportionately, and the mixture shall be divided

الأردى من جنس واحد، فيشتركان في العين بنسبة المالين، و يقسمان العين و يوزعان الثمن بينهما بنسبة القيمتين كما مرّ.

مسألة ٤٩ ـ لو خلط المغصوب بالأجود أو الأردى و صار قيمة المجموع المخلوط أنقص من قيمة الخليطين منفردين فورد بذلك النقص المالي على المغصوب ضمنه الغاصب، كما لو غصب منّاً من زيت جيّد قيمته عشرة و خلطه بمنّ منه ردي قيمته خمسة و بسبب الاختلاط يكون قيمة المنين إثني عشر، فصار حصة المغصوب منه من الثمن بعد التوزيع ثمانية، و الحال أن زيته غير مخلوط كان يسوى عشرة، فورد النقص عليه باثنين، و هذا النقص يغرمه الغاصب، و إن شئت قلت: يستوفي المالك قيمة ما له غير مخلوط من الثمن، و ما بقي يكون للغاصب.

مسألة ٥٠ ـ فوائد المغصوب مملوكة للمغصوب منه و إن تجددت بعد الغصب، وهي كلها مضمونة على الغاصب، أعياناً كانت كاللبن والولد و الشعر و الثمر، أو منافع كسكنى الدار و ركوب الدابة، بل كل صفة زادت بها قيمة المغصوب لو وجدت في زمان الغصب ثم زالت و نقصت بزوالها قيمته ضمنها الغاصب و إن ردّالعين كما كانت قبل الغصب، فلو غصب دابة هازلة ثم سمنت فزادت قيمتها بسبب ذلك ثم هزلت ضمن الغاصب تلك الزيادة التي حصلت ثم زالت، نعم لو زادت القيمة لزيادة صفة ثم زالت تلك الصفة ثم عادت الصفة بعينها لم يضمن قيمة الزيادة التالفة، لانجبارها بالزيادة العائدة، كما إذا سمنت الدابة في يده فزادت قيمتها ثم هزلت ثم سمنت، فانه لا يضمن الزيادة الحاصلة بالسمن الأول إلا إذا نقصت الزيادة الثانية عن الأولى بأن كانت الزيادة الحاصلة بالسمن الأول درهمين و الحاصلة بالثاني درهماً مثلاً، فيضمن التفاوت.

مسألة ٥١ ـ لو حصلت فيه صفة فزادت قيمته ثم زالت فنقصت ثم حصلت فيه صفة أخرى زادت بها قيمته لم يزل ضمان زيادة الأولى و لم ينجبر نقصانها بالزيادة الثانية، كما إذا سمنت الدابة المغصوبة ثم هزلت فنقصت قيمتها ثم

accordingly, and also its sale proceeds shall also be divided in the same proportion, as already mentioned.

Problem # 49. If a person mixes the usurped thing with something higher or lower in quality, and the price of the mixture becomes lower than the respective prices of the two things mixed, causing a financial loss to the usurped thing, the usurper shall be held liable for it, as when he usurped a Maund of good quality oil worth ten [Dinars] and mixed it with a Maund of another oil of a lower quality worth five [Dirhams], and due to mixing the two things the price of the two Maunds becomes twelve [Dirhams], consequently the share of the usurped thing comes to eight [Dirhams] on the division of the sale proceeds of the mixture, while the price of its oil before mixing was equivalent to ten [Dirhams], and so it has incurred a loss of two [Dirhams], which is to be indemnified by the usurper. It may also be said that the master of the usurped thing may receive the price of his unmixed property out of the sale proceeds, and the rest shall go to the usurper.

Problem # 50. All the benefits accruing to the usurped thing shall belong to the master, even if they have taken place after the usurpation, and they are all the liability of the usurper, regardless whether they are in tangible form as milk, offspring, hair or fruits, or usufructs as residence in a house or riding an animal; rather, every quality that has raised the price of the usurped thing, though taking place during the period of usurpation, then disappeared and consequently bringing down its price, the usurper shall be held liable for it, even if he restores the usurped thing as it was before the usurpation. So if he usurps a thin animal that later becomes fat, thereby raising its price, and again it becomes thin, the usurper shall indemnify the increase that took place and then disappeared

Of course, if the price has gone up due to the addition of a quality, and later the quality has disappeared, and again it has appeared as it was, the usurper shall not be held liable for the price of the increase that has later disappeared due to the subsequent restoration of the increase, as when an animal fattens while the possession of the usurper, consequently raising its price, then it becomes thin and again fattens, then the usurper shall not be held liable for the increase in the price due to the first fattening of the animal, except when the second increase has been less than the first, so that, for example, the increase due to the first fattening was worth two [Dirhams], while that of the second worth one [Dirham], in which case the usurper shall indemnify the difference [between the two increases].

Problem # 51. If a quality takes place in the usurped thing raising thereby its price, then it disappears, thereby decreasing its price, then another quality takes place in it, raising its price.The liability for the first quality shall not be waived off and its loss compensated by the second quality, as when a usurped animal fattens [thereby raising its price], and then becomes thin, consequently bringing down its price, and again its becomes agreeable, raising its price as much as the first instance or even more than that, the liability of the usurper shall not be condoned due to the first increase.

Problem # 52. If, for example, a person usurps a grain and sows it, or an egg and has its hatched under a hen, the agricultural produce or the chicken shall belong to the usurper. Likewise, if he usurps wine and it becomes vinegar, or usurps juice and it becomes wine while in his possession, it shall

ارتاضت فزادت قيمتها بقدر زيادة الأولى أو أزيد لم يزل ضمان الغاصب للزيادة الأولى.

مسألة ٥٢ ـ اذا غصب حباً فزرعه أو بيضاً فاستفرخه تحت دجاجته مثلاً كان الزرع و الفرخ للمغصوب منه، و كذا لو غصب خمراً فصارت خلاً أو غصب عصيراً فصار خمراً عنده ثم صارت خلاً فانه ملك للمغصوب منه لا الغاصب، و أما لو غصب فحلاً فأنزاه على الأنثى و أولدها كان الولد لصاحب الأنثى و إن كان هو الغاصب، و عليه أجرة الضراب.

مسألة ٥٣ ـ جميع ما مرّ من الضمان و كيفيته وأحكامه و تفاصيله جارية في كل يد جارية على مال الغير بغير حق و إن لم تكن عادية و غاصبة و ظالمة إلا في موارد الأمانات، مالكية كانت أو شرعية كما عرفت التفصيل في كتاب الوديعة، فتجري في جميع مايقبض بالمعاملات الفاسدة و ما وضع اليد عليه بسبب الجهل و الاشتباه، كما إذا لبس مداس غيره أو ثوبه اشتباهاً أو أخذ شيئاً من سارق عارية باعتقاد أنه ما له، و غير ذلك مما لا يحصى.

مسألة ٥٤ ـ كما أن اليد الغاصبة و ما يلحق بها موجبة للضمان ـ و هو المسمى بضمان اليد، و قد عرفت تفصيله في المسائل السابقة ـ كذلك للضمان سببان آخران: الا تلاف و التسبيب، و بعبارة أخرى له سبب آخر و هو الا تلاف، سواء كان بالمباشرة أو التسبيب.

مسألة ٥٥ ـ الا تلاف بالمباشرة واضح لا يخفى مصاديقه، كما إذا ذبح حيوانا أو رماه بسهم فقتله، أو ضرب على إناء فكسره، أورمى شيئاً في النار فأحرقته وغير ذلك مما لا يحصى، و أما الا تلاف بالتسبيب فهو إيجاد شيء يترتب عليه الا تلاف بسبب وقوع شيء، كما لو حفر بئراً في المعابر فوقع فيها إنسان أو حيوان، أو طرح المعاثر و المزالق كقشر البطيخ و الرقي في المسالك أو أوتد و تداً في الطريق فأصاب به عطب أو جناية على حيوان أو إنسان، أو وضع شيئاً على الطريق فتمر به الدابة فتنفر بصاحبها فتعقره، أو أخرج ميزاباً على الطريق فأضر

belong to the person from whom the original thing has been usurped and not to the usurper. If, however, he usurps a male animal and lets it copulate with a female one, resulting in the birth of an offspring, the offspring shall belong to the master of the female animal, even if he happens to be a usurper, and he shall have to pay the remuneration for the pairing.

Problem # 53. Whatever has been mentioned here relating to the guarantee, its nature, rules and details applicable in all cases of possession are applicable to the property of another without due right, even if it not due to enmity, usurpation or oppression, except in case of trusts, proprietary or legal, as has been understood in the Section on *Wadī'ah* or Deposit. It is applicable to everything that is possessed by vitiated transactions, or what has been possessed due to ignorance or misunderstanding, as when a person wears the shoe or garment of another due to misunderstanding, or receives something from a thief as an *'Āriyah*, considering it to be the property of the thief, and such other innumerable instances.

Problem # 54. As the possession by usurpation and its accessories entails liability, and it is termed as guarantee of possession, the details of which have already been given in the preceding Problems, likewise there are other two causes for liability, namely, destruction and causation. In other words, it has another cause, and that is destruction, whether it is caused personally or through some means.

Problem # 55. A destruction caused personally is quite obvious and it has numerous instances, as when a person slaughters an animal or throws an arrow on it and kills it, or strikes something against a utensil and breaks it, or throws something into the fire and burns it, and such innumerable cases. As regards destruction by mediate causation, like bringing about something that causes destruction, as digging a well on a thorough fare into which a person or animal falls, or throwing some slippery thing as the skin of a melon or banana on the roads, putting a nail on a street causing some damage or injury to an animal or human being, throwing something on the path startling an animal as a result of which the animal throws down its rider and injures him, springing out sewerage on the road causing damage to the passers-bye, throwing in a place full of beasts a child or an animal who is so weak that it cannot escape and so it is devoured by the beasts. To this also belongs unfastening the reins of an animal and letting it run away or opening the cage of a bird and letting it fly immediately or after a while.

In all these cases, the person committing such mediate causes shall be held responsible and shall have to indemnify the damaged object or pay its substitute, by delivering its equivalent if it belongs to the category having a substitute or its price if it belongs to things having price. If he has been a mediate for causing defect in the damaged thing, he shall be liable for the payment of *Arsh* for it as has been mentioned under the guarantee of possession.

Problem # 56. If a person usurps a sheep having a young causing the death of the young due to

بالمارة، أو ألقى صبياً أو حيواناً يضعف عن الفرار في مسبعة فقتله السبع، و من ذلك ما لو فك القيد عن الدابة فشردت، أو فتح قفصاً عن طائر فطار مبادراً أو بعد مكث و غير ذلك، ففي جميع ذلك يكون فاعل السبب ضامنا، و يكون عليه غرامة التالف و بدله، إن كان مثلياً فبالمثل، و إن كان قيمياً فبالقيمة، و إن صار سبباً لتعيب المال كان عليه الأرش كما مر في ضمان اليد.

مسألة ٥٦ - لو غصب شاة ذات ولد فمات ولدها جوعاً أو حبس مالك الماشية أو راعيها عن حراستها فاتفق تلفها لم يضمن بسبب التسبيب إلا إذا انحصر غذاء الولد بارتضاع من أمه و كانت الماشية في محال السباع و مظان الخطر و انحصر حفظها بحراسة راعيها، فعليه الضمان حينئذ على الأحوط.

مسألة ٥٧ - و من التسبيب الموجب للضمان ما لو فك و كاء ظرف فيه مائع فسال ما فيه، و أما لو فتح رأس الظرف ثم اتفق أنه قلبته الريح الحادثة أو انقلب بوقوع طائر عليه مثلاً فسال ما فيه ففي الضمان تردد و إشكال، نعم يقوى الضمان فيما كان ذلك في حال هبوب الرياح العاصفة أو في مجتمع الطيور ومظان وقوعها عليه.

مسألة ٥٨ - ليس من التسبيب الموجب للضمان ما لو فتح باباً على مال فسرق أو دلّ سارقاً عليه فسرقه، فلا ضمان عليه.

مسألة ٥٩ - لو وقع الحائط على الطريق مثلاً فتلف بوقوعه مال أو نفس لم يضمن صاحبه إلا إذا بناه مائلاً الى الطريق أو مال إليه بعد ما كان مستوياً و قد تمكن صاحبه من الازالة و لم يزله، فعليه الضمان في الصورتين على الأقوى.

مسألة ٦٠ - لو وضع شربةً أو كوزاً مثلاً على حائطه فسقط و تلف به مال أو نفس لم يضمن إلا إذا وضعه مائلاً إلى الطريق أو وضعه على وجه يسقط مثله.

مسألة ٦١ - و من التسبيب الموجب للضمان أن يشعل ناراً في ملكه وداره فتعدت و أحرقت دار جاره مثلاً فيما إذا تجاوز قدر حاجته و يعلم أو يظن تعديها لعصف الهواء مثلاً، بل الظاهر كفاية الثاني فيضمن مع العلم أو الظن بالتعدي

starvation, or imprisons, or shepherd of a flock not letting him take care of the flock causing death of the flock, he shall not be held liable for mediate causation except when the food of the young of the sheep was confined to its feeding by its mother, or the flock lay in a place full of beasts and there was a genuine risk to its life as the shepherd was its sole protector, in such conditions, according to the more cautious opinion, the person shall be held responsible for the loss.

Problem # 57. To the mediate causation belongs the case when a person opens the lid of a container containing a fluid and consequently its content spills away. If, however, a person opens the cover of a container and it turns due to an incidental wind, or, suppose, it turns due to the falling of a bird on it, consequently its content spills away, then there shall be hesitation and difficulty in his liability for it. Of course, the chances of his liability become strong in case it has happened at a time when there was a strong wind blowing, and it was a place full of birds where there was a risk of their falling on the container.

Problem # 58. To the mediate causation does not belong the case when a person opens the door of a property and it is stolen, or guides a thief up to it and he steals it, in which case he shall be under no liability what so ever.

Problem # 59. If a wall falls on the road causing destruction of some property or death of a person, its master shall not be held liable for it except when he had built it reclining towards the road or when it had reclined after having been built straight and the master could have repaired but he failed to do so, then, according to the stronger opinion, he shall be held liable for in both the cases.

Problem # 60. If a person puts, suppose, syrup or a jug on his wall, and it falls, causing destruction of some property or the death of a person, he shall not be held liable for it except when he had put it reclining towards the road or had placed it in a way that such things could fall.

Problem # 61. To the mediate caution belongs the case when a person lights fire in his property or house, and its spreads and burns, suppose, the house of his neighbour, in case he had lit the fire more than his need, or with the knowledge or possibility of its spreading due to, suppose, the blowing of a strong wind.

Rather apparently the second case is sufficient, and so he shall be held liable for it in case of having knowledge or there was possibility of its spreading, even if it was to the extent of his need.

Rather his liability is not far from being likely if he believed that the fire shall not spread, but it turned out to be otherwise, as when there was wind blowing at the time of lighting the fire, but he believed that such wind would not spread the fire to the neighbour's house, though its contrary took

ولو كان بمقدار الحاجة، بل لا يبعد الضمان إذا اعتقد عدم كونها متعدية فتبين خلافه، كما إذا كانت ريح حين اشتعال النار و هو قد اعتقد أن بمثل هذه الريح لا تسري النار إلى الجار فتبين خلافه، نعم لو كان الهواء ساكناً بحيث يؤمن معه من التعدي فاتفق عصف الهواء بغتة فطارت شرارتها يقوى عدم الضمان.

مسألة ٦٢ - إذا أرسل الماء في ملكه فتعدى الى ملك غيره فأضرّ به ضمن ولو مع اعتقاده عدم التعدي، نعم ضمانه فيما إذا خرجت من اختياره في صورة اعتقاده عدم التعدي محل إشكال، و الأحوط الضمان، ولو كان طريقه الى ملك الغير مسدوداً حين إرسال الماء فدفع بغير فعله فلا ضمان عليه.

مسألة ٦٣ - لو تعب حمّال الخشبة فأسندها إلى جدار الغير ليستريح بدون إذن صاحب الجدار فوقع باسناده إليه ضمنه و ضمن ما تلف بوقوعه عليه، ولو وقعت الخشبة فأتلفت شيئاً ضمنه سواء وقعت في الحال أو بعد إذا كان مستنداً اليه.

مسألة ٦٤ - لو فتح قفصاً عن طائر فخرج و كسر بخروجه قارورة شخص مثلاً ضمنها على الأحوط، و كذا لو كان القفص ضيقاً مثلاً فاضطرب بخروجه فسقط و انكسر.

مسألة ٦٥ - إذا أكلت دابة شخص زرع غيره أو أفسدته فان كان معها صاحبها راكباً أو سائقاً أو قائداً أو مصاحباً ضمن ما أتلفته، و إن لم يكن معها بأن انفلتت من مراحها مثلاً فدخلت زرع غيره ضمن ما أتلفته إن كان ذلك ليلاً، نعم ضمانه فيما إذا خرجت من اختياره محل إشكال، و الأحوط الضمان، و ليس عليه ضمان إن كان نهاراً.

مسألة ٦٦ - لو كانت الشاة أو غيرها في يد الراعي أو الدابة في يد المستعير أو المستأجر فأتلفتا زرعاً أو غيره كان الضمان على الراعي و المستأجر و المستعير لا على المالك و المعير.

مسألة ٦٧ - لو اجتمع سببان للاتلاف بفعل شخصين فان لم يكن أحدهما

place. Of course, if the wind was quiet, in a way that one could believe that the fire would not spread, but then suddenly a strong wind started blowing and so the sparks of fire began flying, in which case his lack of liability shall be strengthened.

Problem # 62. If a person sends water to his property, but it spreads to the property of another, causing damage to it, he shall be held liable for it despite his belief that it shall not spread. Of course, in case it turned out of his control though he believed that would not spread, there shall be hesitation in his liability, though, according to the more cautious opinion, he shall be liable. If the passage to the property of another was close, and it opened without his mistake, he shall have no liability what so ever.

Problem # 63. If the carrier of wood becomes tired and kneels against the wall of another to take rest without the permission of the owner of the wall, and the wall falls down due to his reclining against it, he shall be held liable for it, and shall also be liable for what is destroyed due the falling of the wall on it. If the wood falls, causing destruction of something, he shall be liable for it, regardless whether it falls immediately or after he was reclining against the wall.

Problem # 64. If a person opens the cage of a bird, and the bird comes out and, suppose, the bottle of a person is broken due to its coming out, according to more cautious opinion, he shall be held liable for it. Likewise, if, suppose, the cage was narrow and the bird became restive for coming out, and it falls and is broken, [he shall be held liable].

Problem # 65. If an animal eats or destroys the farm of another, then if its master was riding on it or was driving or goading it or walking with it, he shall be held liable for what is destroyed by the animal. If, however, he does not accompany the animal, and it has fled from its resting place and entered the farm belonging to another, he shall be held liable for what is destroyed by it if it was night.

Of course, there is hesitation in his liability if the animal goes out of the control of its master, though, according to the more cautious opinion, he shall be liable. He shall, however, have no liability if it was day.

Problem # 66. If a sheep or the like was in the possession of a shepherd, or an animal in the possession of one having it on an *'Āriyah* or hire, and they destroy the farm or the like, the shepherd, the hirer or one having it on an *'Āriyah* shall be held liable, and not their master or one giving them on *'Āriyah*.

Problem # 67. If two causes assemble in destruction by mediate causation of two persons, if the cause of neither of them has preceded that of the other, both shall share the liability. Otherwise, the one whose cause has preceded that of the other shall be held liable. So if a person digs a well in a thoroughfare, and another puts a stone near it, and a man or animal stumbles and falls into the well, the liability shall fall on the one putting the stone and not on the one digging the well, though there is likelihood of both sharing the liability in all circumstances.

أسبق في التأثير اشتركا في الضمان، وإلا كان الضمان على المتقدم في التأثير، فلو حفر شخص بئراً في الطريق و وضع شخص آخر حجراً بقربها فعثر به إنسان أو حيوان فوقع في البئر كان الضمان على واضع الحجر دون حافر البئر، و يحتمل قوياً اشتراكهما في الضمان مطلقاً.

مسألة ٦٨ ـ لو اجتمع السبب مع المباشر كان الضمان على المباشر دون فاعل السبب، فلو حفر شخص بئراً في الطريق فدفع غيره فيها إنساناً أو حيواناً كان الضمان على الدافع دون الحافر، نعم لو كان السبب أقوى من المباشر كان الضمان عليه لا على المباشر، فلو وضع قارورة تحت رجل شخص نائم قد رجله فكسرها كان الضمان على الواضع دون النائم.

مسألة ٦٩ ـ لو أكره على إتلاف مال غيره كان الضمان على من أكرهه، و ليس عليه ضمان، لكون السبب أقوى من المباشر، هذا إذا لم يكن المال مضمونا في يده بأن اكرهه على إتلاف ما ليس تحت يده أو على إتلاف الوديعة التي عنده مثلاً، و أما إذا كان المال مضموناً في يده كما إذا غصب مالاً فأكرهه شخص على إتلافه فالظاهر ضمان كليهما، فللمالك الرجوع على أيهما شاء، فان رجع على المكره بالكسر لم يرجع على المكره بالفتح، بخلاف العكس، هذا إذا أكره على إتلاف المال، و أما لو أكره على قتل أحد معصوم الدم فقتله فالضمان على القاتل من دون رجوع على المكره و إن كان عليه عقوبة، فانه لا إكراه في الدماء.

مسألة ٧٠ ـ لو غصب مأكولاً مثلاً فأطعمه المالك مع جهله بأنه ما له بأن قال له: «هذا ملكي و طعامي» أو قدمه إليه ضيافة مثلاً أو غصب شاة و استدعى من المالك ذبحها فذبحها مع جهله بأنه شاته ضمن الغاصب و إن كان المالك هو المباشر للاتلاف، نعم لو دخل المالك دار الغاصب مثلاً و رأى طعاماً فأكله على اعتقاد أنه طعام الغاصب فكان طعام الآكل فالظاهر عدم ضمان الغاصب و قد برأ من ضمان الطعام.

Problem # 68. If a mediate causation assembles with that of a personal performance, the liability shall go to the one responsible for personal performance to the exclusion of the one responsible for mediate causation. So if a person digs well in a thoroughfare, and another throws a man or animal into it, the liability shall be on the one throwing the man or animal into the well and not on the one digging it.

Of course, if the cause of the mediate causation is stronger than that of personal performance, the former shall be liable to the exclusion of the latter. So if a person puts a glass under the feet of a sleeping person, who spreads his feet, thereby breaking the glass, the liability shall be on the one putting the glass and not on the sleeping person.

Problem # 69. If a person coerces another to destroy the property belonging to another, the liability shall be on the person coercing and not the one destroying the property, due to mediate causation being stronger than the personal performance. This is the case when the property is not already guaranteed in his possession, as when, suppose, someone coerces another to destroy what is not in his possession, or for the destruction of destruction of what is in his trust.

If, however, the property is guaranteed in his possession, as when he usurps a property and another coerces him to destroy it, then apparently both of them shall be held liable for the destruction, and the master of the property may have recoursc to either of them he likes for the recovery of the damage. If he turns to the coercer for the damages, he shall have no recourse against the coerced, contrary to otherwise. This is when he has recourse for the destruction of property. If, however, a person coerces another to kill an innocent person and he kills him, the killer shall be held liable without any recourse to the coercer, though the latter shall be liable for punishment of his offence. It is because the law of coercion is not applied to shedding blood.

Problem # 70. If a person usurps, suppose, some eatables, and feeds it to the master who is ignorant of the eatables belonging to him, as when the usurper says to the master of the eatables: "This is my property and my food," or offers it in a feast, or usurps a sheep and asks its master to slaughter it, and the master slaughters it out of ignorance about the sheep belonging to him, the usurper shall be held liable for it, although the master was the one who has personally performed the destruction [of his property]. If a master enters the house of a usurper, and finds, suppose, some food, and eats it under the impression that it belongs to the usurper, while it belonged to himself, then apparently the usurper shall not be liable for it, and shall be exonerated from the liability of [usurping] the food.

Problem # 71. If a person usurps eatables from another and feeds it to some one other than its master as if it was his property while the eater is ignorant of the fact that it belongs to some one else, as, suppose, when he offers it to him as a feast, both shall be held liable for it, and it shall be up to the master to demand its compensation from either of them he likes. If he got the compensation from the usurper, he shall not be allowed to have recourse against the eater. Likewise, if he has got the

مسألة ٧١- لو غصب طعاماً من شخص و أطعمه غير المالك على أنه ماله مع جهل الآكل بأنه مال غيره كما إذا قدّمه اليه بعنوان الضيافة مثلاً ضمن كلاهما، فللمالك أن يغرم أيهما شاء، فان أغرم الغاصب لم يرجع على الآكل، و إن أغرم الآكل رجع على الغاصب لأنه قد غره.

مسألة ٧٢ - إذا سعى الى الظالم على أحد أو اشتكى عليه عنده بحق أو بغير حق فأخذ الظالم منه مالاً بغير حق لم يضمن الساعي و المشتكي ما خسره و إن أثم بسبب سعايته أو شكايته إذا كانت بغير حق، و انما الضمان على من أخذ المال.

مسألة ٧٣ - إذا تلف المغصوب و تنازع المالك و الغاصب في القيمة و لم تكن بيّنة ففي أن القول قول الغاصب أو المالك تردد ناش من التردد في معنى «على اليد ما أخذت...» الخ، و احتمال أن يكون نفس المأخوذ على عهدته حتى بعد التلف و يكون أداء المثل أو القيمة نحو أداء له، فيكون القول قول المالك بيمينه، و احتمال أن ينتقل بالتلف إلى القيمة، فيكون القول قول الغاصب بيمينه، ولا يخلو هذا من قوة، ولو تنازعا في صفة تزيدبها الثمن بأن ادعى المالك وجود تلك الصفة فيه يوم غصبه أو حدوثها بعده و إن زالت فيما بعد و أنكره الغاصب و لم يكن بيّنة فالقول قول الغاصب بيمينه بلا إشكال.

مسألة ٧٤ - إن كان على الدابة المغصوبة رحل أو علق بها حبل و اختلفا فيما عليها فقال المغصوب منه: «هولي» و قال الغاصب: «هولي» و لم يكن بيّنة فالقول قول الغاصب مع يمينه لكونه ذا يد فعلية عليه.

compensation from the eater, he shall not be allowed to have recourse against the usurper, as it is he who has cheated him.

Problem # 72. If a person backbites against another before an oppressor or brings a complaint against another before him right or wrong, and consequently the oppressor occupies the property of that person unjustly, the backbiter or the complainant shall be liable for the damage done to the victim, though they shall be considered to have committed a sin due to their backbite or complaint, when it was not right, and actually the liability shall be on the person who has occupied the property unjustly.

Problem # 73. If the usurped object has been destroyed, and the master and the usurper dispute over its price, there being no evidence [in favour of either of them], then there shall be hesitation as to whose word is to be preferred arising from the sense of the Tradition saying: "It is up to the possessor (to bring evidence in favour) of what he has occupied..."

There is likelihood that the usurper shall be held liable even after the loss of the usurped object, and returning its substitute or payment of its price shall be like the payment of the usurped object itself. In such case, the word of the master shall be entertained provided it is followed by his oath.

In case of the likelihood of turning to the price of the object after its loss, the word of the usurper is to be preferred provided it is followed by his oath, and this is not devoid of force.

In case the master and the usurper have a dispute over a quality that would enhance the price of the usurped object, as when the master claims that the usurped object possessed that quality on the day of its usurpation or its occurrence subsequently though later it disappeared, and the usurper denies it, while there is no evidence [in favour of either of them], then the word of the usurper shall be entertained followed by his oath, without any hesitation.

Problem # 74. If there was a saddle on the usurped animal or it was fastened with a rope, and the master and the usurper dispute over it, so that the person from whom the animal has been usurped says; "It belongs to me," while the usurper claims: "It belongs to me," but there is no evidence [in favour of either of them], then the word of the usurper shall be entertained provided that it is followed by his oath, as at present the usurped object is in his possession.

كتاب احياء الموات والمشتركات

القول في إحياء الموات

الموات هي الأرض العطلة التي لا ينتفع بها إما لانقطاع الماء عنها أو لاستيلاء المياه أو الرمال أو السبخ أو الأحجار عليها. أو لاستئجامها و التفاف القصب والأشجار بها أو لغير ذلك، و هو على قسمين:

الأول ـ الموات بالأصل، و هو ما لا يكون مسبوقاً بالملك و الاحياء و إن كان إحراز ذلك غالباً بل مطلقاً مشكلاً بل ممنوعاً، و يلحق به ما لم يعلم مسبوقيته بهما.

الثاني ـ الموات بالعارض، و هو ما عرض عليه الخراب و الموتان بعد الحياة و العمران، كالأرض الدارسة التي بها آثار الأنهار و نحوها والقرى الخربة التي بقيت منها رسوم العمارة.

مسألة ١ ـ الموات بالأصل و إن كان للامام عليه السلام حيث أنه من الأنفال كما مر في كتاب الخمس، لكن يجوز في زمان الغيبة لكل أحد إحياؤه مع الشروط الآتية و القيام بعمارته، و يملكه المحيي على الأقوى سواء كان في دار الاسلام أو في دار الكفر، و سواء كان في أرض الخراج كأرض العراق أو في غيرها، و سواء كان المحيي مسلماً أو كافراً.

مسألة ٢ ـ الموات بالعارض الذي كان مسبوقاً بالملك و الاحياء إذا لم يكن له

SECTION THIRTY – SIX

RECLAMATION OF BARREN LANDS (*IḤYĀ' AL-MAWĀT*)

& PUBLIC PROPERTIES (*MUSHTARAKĀT*)

Chapter One - Reclamation of Barren Lands

Mawāt (Barren Lands or Wastelands) are the lands that have been left without care and they are no more used due to certain reasons, as due to the disconnection of water, being submerged under water, having sandy or briny soil or being covered with stones, having shrubs grown on it, being covered by reeds or [wild] trees, etc.

They are of two kinds:
Firstly, lands originally barren lands or wastelands. They are the lands that have no record of having been property of any one or developed before, even if the knowledge about it is mostly, rather absolutely difficult, rather impossible.

To this category are affiliated the lands about which there is no knowledge of having been the property of any one or developed before.
Secondly, lands that have turned barren or wasteland after having been cultivated or developed, as old lands that have remains of canals or the like, or devastated villages with existing traces of development.
Problem # 1. Lands that are originally barren, even if belonging to the Imām, Peace be upon him, being part of *Anfāl*, as mentioned under the Section on *Khums*, are allowed to be developed by any one during the Occultation (*Ghaybat*) [of the Twelfth Imām Mahdī], with the conditions mentioned hereunder, and they shall belong to the person who develops them, irrespective of their lying in the *Dār al-Islām* or *Dār al-Kufr* , and whether they lie in the *Kharāj* region as the lands of Iraq or otherwise, and whether the developer is a Muslim or an infidel.
Problem # 2. Lands that have turned barren after having been owned and developed, when their master is not known, are of two kinds:

Firstly, lands the inhabitants of which have migrated and due to the passage of time they have been ownerless. They are like the ancient lands, devastated villages and towns and obliterated canals belonging to the ancient people from whom no trace or where about is left, or those attributed to the people or tribes of whom nothing is left except mere names.

مالك معروف على قسمين: الأول ـ ما باد أهلها و صارت بسبب مرور الزمان و تقادم الأيام بلا مالك، و ذلك كالأراضي الدارسة و القرى و البلاد الخربة و القنوات الطامسة التي كانت للأمم الماضين الذين لم يبق منهم اسم ولا رسم، أو نسبت الى أقوام أو أشخاص لم يعرف منهم إلا الاسم، الثاني ـ ما لم تكن كذلك و لم تكن بحيث عدت بلا مالك، بل كانت لمالك موجود و لم يعرف شخصه، و يقال لها: مجهولة المالك، فأما القسم الأول فهو بحكم الموات بالأصل في كونه من الأنفال و أنه يجوز إحياؤه و يملكه المحيي، فيجوز إحياء الأراضي الدارسة التي بقيت فيها آثار الأنهار والسواقي و المروز، و تنقية القنوات و الآبار المطمومة و تعمير الخربة من القرى والبلاد القديمة التي بقيت بلا مالك، ولا يعامل معها معاملة مجهول المالك، و لا يحتاج الى الاذن من حاكم الشرع أو الشراء منه، بل يملكها المحيي و المعمّر بنفس الاحياء و التعمير، وأما القسم الثاني فالاحوط الاستئذان فيه من الحاكم في الاحياء والقيام بتعميره و التصرف فيه، كما أن الأحوط معاملة مجهول المالك معه بأن يتفحص عن صاحبه و بعد اليأس يشتري عينها من حاكم الشرع و يصرف ثمنها على الفقراء، و إما أن يستأجرها منه بأجرة معينة أو يقدرّ ما هو أجرة مثلها لو انتفع بها و يتصدق بها على الفقراء، و الأحوط الاستئذان منه، نعم لو علم أن مالكها قد أعرض عنها أو انجلى عنها أهلها وتركوها لقوم آخرين جاز إحياؤها وتملكها بلا إشكال.

مسألة ٣ ـ إن كان ما طرأ عليه الخراب لمالك معلوم فان أعرض عنه مالكه كان لكل أحد إحياؤه و تملكه، و إن لم يعرض عنه فان أبقاه مواتاً للانتفاع به في تلك الحال من جهة تعليف دوابه أو بيع حشيشه أو قصبه و نحو ذلك ـ فربما ينتفع منه مواتاً أكثر مما ينتفع منه محياة ـ فلا إشكال في أنه لا يجوز لأحد إحياؤه و التصرف فيه بدون إذن مالكه، و كذا فيما إذا كان مهتماً باحيائه عازماً عليه و إنما أخر الاشتغال به لجمع الآلات و تهيئة الأسباب المتوقعة الحصول أو لانتظار وقت صالح له، و أما لو ترك تعمير الأرض و إصلاحها و أبقاها الى الخراب من

Secondly, lands that are not of the previous type, and they are not treated as having no owner. But they belong to a living owner, but it is not known as to who he is. Such lands are called "Lands having unknown owners."

As regards the first kind, they are treated as the originally barren lands in being part of *Anfāl*, their development being permissible and their ownership would go to their developer.

So it is allowed to reclaim ancient lands in which there are traces of canals, waterways and bazaars, dredging the canals and obliterated wells, repairing the devastated villages and ancient towns that have remained without owners. They are not to be treated as whose owner is not known, there being no need of obtaining the permission of the judge or purchasing them from him, and they fall under the ownership of the one reclaiming or developing them by the development and reclamation.

As regards the second kind of lands, however, it requires the permission of the judge for reclaiming or action for developing them, or making any changes in them, as, according to the more cautious opinion, they are to be treated as lands whose owner is not known, so that search is to be made for their owner, and after there is no hope of finding him, to purchase them from the judge and their price must be spent on the poor, or obtain them on a prescribed rent from him, or determine their proper compensation if he has utilised them and distribute it as charity among the poor. It is more cautious to obtain permission of the judge.

Of course, if it is known that their owner has withdrawn himself from them or their inhabitants have migrated and have left these lands for other people, it shall be allowed to develop and own them without any hesitation.

Problem # 3. If the lands that are subjected to devastation belong to a known owner, and he abandons them, they shall be allowed for development and to be owned by any one. If their owner has not abandoned them, but has left them unutilised for utilising them for the fodder of his animals, or sale of its grass or reeds, or the like, as sometimes barren lands are utilised more than the developed ones. There is no hesitation in that it is not permissible for any one to develop them or make any changes in them, without the permission of their owner. The same rule shall apply if a person intends to develop a barren land, but delays its start for collecting its implements and arranging the means that are expected to be obtained, or due to waiting for a suitable time for it.

If a person gives up the development and repair of a land, and leaves it in a devastated condition by not paying due care for it or arranging and paying due attention to its repair, without intending to develop it either due to lack of need for it or being busy in the development of another land, leaving the land abandoned for a considerable time until it has turned barren, then if its owner has come

جهة عدم الاعتناء بشأنها و عدم الاهتمام و الالتفات إلى مرمتها و عدم عزمه على إحيائها إما لعدم حاجته اليها أو لاشتغاله بتعمير غيرها فبقيت مهجورة مدة معتداً بها حتى آلت إلى الخراب فان كان سبب ملك المالك غير الاحياء مثل أنه ملكها بالارث أو الشراء فليس لأحد وضع اليد عليها وإحياؤها و التصرف فيها إلا باذن مالكها، ولو أحياها أحد و تصرف فيها و انتفع بها بزرع أو غيره فعليه أجرتها لمالكها، و إن كان سبب ملكه الاحياء بأن كانت أرضاً مواتاً بالأصل فأحياها و ملكهاثم بعد ذلك عطلها وترك تعميرها حتى آلت إلى الخراب فجوّز إحياء ها لغيره بعضهم، و هو في غاية الاشكال، بل عدمه لا يخلو من قوة.

مسألة ٤ ـ كما يجوز إحياء القرى الدارسة و البلاد القديمة التي باد أهلها و صارت بلا مالك بجعلها مزرعاً أو مسكناً أو غير هما كذا يجوز حيازة أجزائها الباقية من أحجارها وأخشابها و آجرها و غيرها، و يملكها الحائز إذا أخذها بقصد التملك .

مسألة ٥ ـ لو كانت الأرض موقوفة و طرأ عليها الموتان و الخراب فان كانت من الموقوفات القديمة الدارسة التي لم يعلم كيفية وقفها و أنها خاص أو عام أو وقف على الجهات ولم يعلم من الاستفاضة و الشهرة غير كونها وقفاً على أقوام ماضين لم يبق منهم اسم ولا رسم أو قبيلة لم يعرف منهم إلا الاسم فالظاهر أنها من الأنفال، فيجوز إحياؤها، كما إذا كان الموات المسبوق بالملك على هذا الحال،و إن علم أنها وقف على الجهات ولم تتعين بأن علم أنها وقف إما على مسجد أو مشهد أو مقبرة أو مدرسة أو غيرها و لم يعلمها بعينها أو علم أنها وقف على أشخاص لم يعرفهم بأشخاصهم و أعيانهم كما إذا علم أن مالكها قد وقفها على ذريته ولم يعلم من الواقف و من الذرية فالظاهر أن ذلك بحكم الموات المجهول المالك الذي نسب إلى المشهور القول بأنه من الأنفال، و قد مر ما فيه من الاشكال بل القول به هنا أشكل، والأحوط الاستئذان من الحاكم لمن أراد إحياءها و تعميرها و الانتفاع بها بزرع أو غيره، و أن يصرف أجرة مثلها في

to own it without developing it, as when he has obtained its ownership through inheritance or purchase, then no one shall be allowed to develop it or make any changes in it, except with the permission of its owner.

If, however, the cause of his owner was its development, as when the land was originally barren and he has developed it and owned it, and then he has left it forlorn and given up its development until it has turned barren, in such case some of the jurists have declared it permissible for another person to develop it.

There is, however, great difficulty in accepting the above opinion, rather its reverse is not devoid of force.

Problem # 4. As it is permissible to develop obliterated villages and ancient towns the inhabitants of which have migrated and they have turned ownerless, by making farms and residential houses etc. in them, in the same way it is also allowed to collect its remaining parts including stones, wood, bricks, etc., and they shall belong to the person collecting them when he does it with the intention of owning them.

Problem # 5. If the land was endowment and it has turned barren and dilapidated, then if it was among the ancient obliterated endowments whose nature of endowment is not know, whether they are private, or public endowments or meant for special purposes, and it is also not known how they had been utilised and were reputed except their being endowments for the people of yore about whom no traces or details of tribe etc. except their names are left, then apparently they shall be part of *Anfāl*, and so it shall be allowed to develop and reclaim them, as is the case with the property having a record of having been previously owned by some people.

If it is known that the land has been endowed for special purposes, but their specification is not known except that it has been endowment for a mosque, shrine, mausoleum or a school, etc., but nothing is known about it specifically, or it is known that it is endowment for persons but the persons and individuals for whom it is endowed are not known, as when it is known that its owner has endowed it for its progeny, but nothing is known about the endower or the progeny, then apparently it shall be treated as barren lands with unknown owners about which there is the opinion attributed to the jurists that they shall fall under the category of *Anfāl*, and we have already mentioned the difficulty lying in its way, rather such opinion shall be met here with more difficulty, and so according to the more cautious opinion, permission must be obtained from the judge by the person intending to develop or repair such lands by utilising in the form of farms,etc., and that its proper compensation must be spent firstly on charitable purposes and secondly on the poor. Rather in the first instance, reference must be made to the judge. If devastation has overtaken an endowment whose purpose or those in whose favour it is

الأول في وجوه البر، و في الثاني على الفقراء، بل الأحوط خصوصاً في الأول مراجعة حاكم الشرع، و أما لو طرأ الموتان على الوقف الذي علم مصرفه أو الموقوف عليهم فلا ينبغي الاشكال في أنه لو أحياه أحد و عمرّه وجب عليه صرف منفعته في مصرفه المعلوم في الأول، و دفعها وايصالها الى الموقوف عليهم المعلومين في الثاني و إن كان المتولي أو الموقوف عليهم تاركين إصلاحه و تعميره و مرمته إلى أن آل إلى الخراب، لكن ليس لأحد الاحياء و التصرف فيه مع وجود المتولي المعلوم إلا باذنه أو الاستئذان من الحاكم مع عدمه في الأول، و من المتولي أو الموقوف عليهم إن كان خاصاً أو الحاكم إن كان عاماً في الثاني.

مسألة ٦ ـ إذا كان الموات بالأصل حريماً لعامر مملوك لا يجوز لغير مالكه إحياؤه، و إن أحياه لم يملكه، و توضيح ذلك أن من أحيا مواتاً لاحداث شيء من دار أو بستان أو مزرع أو غيرها تبع ذلك الشيء الذي أحدثه مقدار من الأرض الموات القريبة من ذلك الشيء الحادث مما يحتاج اليه لتمام الانتفاع به و يتعلق بمصالحه عادة، و يسمى ذلك المقدار التابع حريماً لذلك المتبوع، و يختلف مقدار الحريم زيادة و نقيصة باختلاف ذي الحريم، و ذلك من جهة تفاوت الأشياء في المصالح والمرافق المحتاج اليها، فما يحتاج اليه الدار من المرافق بحسب العادة غير ما يحتاج اليه البئر و النهر مثلاً، و هكذا باقي الأشياء، بل يختلف ذلك باختلاف البلاد و العادات أيضاً، فاذا أراد شخص إحياء حوالي ما له الحريم لا يجوز له إحياء مقدار الحريم بدون إذن المالك و رضاه، و إن أحياه لم يملكه و كان غاصبا.

مسألة ٧ ـ حريم الدار مطرح ترابها و كناستها ورمادها و مصب مائها و مطرح ثلوجها و مسلك الدخول و الخروج منها في الصوب الذي يفتح إليه الباب، فلو بنى داراً في أرض موات تبعه هذا المقدار من الموات من حواليها، فليس لأحد أن يحيي هذا المقدار بدون رضا صاحب الدار، و ليس المراد من استحقاق الممر في قبالة الباب استحقاقه على الاستقامة و على امتداد الموات، بل المراد أن يبقى مسلك له يدخل و يخرج الى الخارج بنفسه و عياله و أضيافه و ما تعلق به من

made are known, then there should be no problem in the case when some one develops or reclaims it, he shall be bound to spend its usufruct firstly on the prescribed purpose and secondly to deliver it to the specific persons in whose favour it has been made, even if its trustees or those in whose favour it has been made have given up its development and repair until it has become devastated, but no one is allowed to develop it or make changes in it in case there exists its known trustee except with his permission or after obtaining permission from the judge in case there is no trustee, in the first instance, and from the trustee or those in whose favour it has been made if it was a private endowment or from the judge if it was a public endowment in the second instance.

Problem # 6. If an originally barren land is an adjunct (*Ḥarīm*) of an owned developed land, no one except its owner is entitled to develop it, and if some one else develops it, he shall not become its owner. It may be explained that one who develops a barren land for the construction of a house, garden or farm, etc., it shall be appended to the principal land he has developed nearby for its complete utilisation that is usually related to its interests, and it is called an adjunct (*Ḥarīm*) of that principal land.

The extent of this adjunct differs in being small or large with the difference of its owner, and that is in view of the different interests and facilities required for the principal land. It includes the requirement of a house among the usual facilities, but not a well or a canal, for example.

The same is the case with other things. Rather, they also differ with the difference of places and habits. So if a person intends to develop land around the adjunct land of the principal land belonging to another, he shall not be allowed to develop up to the extent required for the adjunct land without the permission and consent of its owner, and if he develops it, he shall not become its owner, and shall be treated as a usurper.

Problem # 7. The adjunct of a houses include the land for throwing its garbage, dust and filth, sewage water and snow, as well as the passage for exit and entrance in the direction where its gate opens. So if a person builds a house on a barren land, this much land shall be adjunct to it in its neighbourhood, and no one else shall be allowed to develop that much land without the permission of the owner of the house.

It does not mean that the owner of the house shall be entitled to an unlimited extent of land in front of his gate in the barren land, but it rather means passage for the exit and entrance for himself, his family and his guests as well as what is required for his cattle, porters and loaders without any trouble, in whatever way it may be.

So any one else shall be entitled to develop the barren land in front of his gate leaving aside passage, though by deviation and turning. The adjunct of the enclosure wall when it is not part of the

دوابه و أحماله و أثقاله بدون مشقة بأي نحو كان، فيجوز لغيره إحياء ما في قبالة الباب من الموات إذا بقي له الممر ولو بانعطاف و انحراف، و حريم الحائط لو لم يكن جزء من الدار بأن كان مثلاً جدار حصار أو بستان أو غير ذلك مقدار ما يحتاج اليه لطرح التراب و الآلات و بل الطين لو انتقض و احتاج الى البناء و الترميم، و حريم النهر مقدار مطرح طينه وترابه إذا احتاج الى التنقية و المجاز على حافتيه للمواظبة عليه و لإصلاحه على قدر ما يحتاج اليه، و حريم البئر ما تحتاج اليه لأجل السقي منها و الانتفاع بها من الموضع الذي يقف فيه النازح إن كان الاستقاء منها باليد، و موضع الدولاب و متردد البهيمة إن كان الاستقاء بها، و مصب الماء و الموضع الذي يجتمع فيه لسقي الماشية أو الزرع من حوض و نحوه، و الموضوع الذي يطرح فيه ما يخرج منها من الطين و غيره لو اتفق الاحتياج اليه، وحريم العين ما تحتاج إليه لأجل الانتفاع بها أو إصلاحها و حفظها على قياس غيرها.

مسألة ٨ ـ لكل من البئر و العين و القناة أعني بئرها الأخيرة التي هي منبع الماء و يقال لها: بئر العين و أمّ الآبار و كذا غيرها إذا كان منشأ للماء حريم آخر بمعنى آخر، و هو المقدار الذي ليس لأحد أن يحدث بئراً أو قناة أخرى فيمادون ذلك المقدار بدون إذن صاحبها، بل الأحوط لحاظ الحريم كذلك بين القناتين مطلقا و إن كان الجواز في غير ما ذكر أشبه، و هو في البئر أربعون ذراعاً إذا كان حفرها لأجل استقاء الماشية من الابل و نحوها منها، وستون ذراعاً إذا كان لأجل الزرع و غيره، فلو أحدث شخص بئراً في موات من الأرض لم يكن لشخص آخر إحداث بئر أخرى في جنبها بدون إذنه، بل ما لم يكن الفصل بينها أربعين ذراعاً أو ستين فما زاد على ما فصل، و في العين و القناة خمسمأة ذراع في الأرض الصلبة و ألف ذراع في الأرض الرخوة، فاذا استنبط إنسان عيناً أو قناة في أرض موات صلبة و أراد غيره حفر أخرى تباعد عنه بخمسمأة ذراع، و إن كانت رخوة تباعد بألف ذراع، ولو فرض أن الثانية يضر

house, as when it is the wall of the garden, etc. shall be to the extent required for throwing dust and keeping implements, rather even for mud if there arises some defect in his building requiring some repair.

The adjunct of the canal shall be to the extent required for throwing its earth and dust when there is need for its dredging and space for walking on both of its sides for its care and repair to the extent needed.

The adjunct of the well shall be to the extent required for drinking from it and utilising it from the space where a person requires to stand for scooping if water is drunk with hands, as well as the space for Persian wheels and passage for the frequent coming and going of the domestic animals if they are supplied water from the well, the space for the water tank or reservoir for supplying drinking water to the domestic animals or the farms from the tanks or reservoirs, etc., as well as the space for throwing the mud etc. that happens to be needed for taking out.

The adjunct of a spring is the space required for its utilisation, repair and preservation in consideration of what is usually required for the other springs.

Problem # 8. For every well and spring as well as subterranean canal, that is the latest well which is source of water and it is called "spring well" or "mother of wells', or any other well when it is a source of water have separate adjuncts, and that the extent in which no other person is allowed to dig another well or subterranean canal without their owners.

Rather, it is more cautious to take into consideration the extent of such an adjunct even between two subterranean canals, though in case of others than mentioned by us permissibility is more likely, and that extent in case of a well is forty cubits when it is dug for watering domestic animals like camels, etc., and sixty cubits when it is required for farming, etc.

If a person digs a well in a barren land, it shall not be allowed for another person to dig another well near it without the permission of the former, rather not unless the distance between the two wells is forty or sixty cubits or more as explained above.

In case of springs and subterranean canals the distance allowed is five hundred cubits in hard soil and a thousand cubits in case of soft soil.

So if a person digs a spring or subterranean canal in a hard barren land, and another intends to dig another spring or subterranean canal, he must leave a distance of five cubits, and if it is soft soil, he must leave a distance of one thousand cubits.

If suppose the second spring or subterranean canal is harmful for the first ones and cause

بالأولى و تنقص ماءها مع البعد المزبور فالأحوط لو لم يكن الأقوى زيادة البعد بما يندفع به الضرر أو التراضي مع صاحب الأولى.

مسألة ٩ ـ اعتبار البعد المزبور في القناة إنما هو في إحداث قناة أخرى كما أشرنا إليه آنفاً، و أما إحياء الموات الذي في حواليها لزرع أو بناء أو غيرهما فلا مانع منه إذا بقي من جوانبها مقدار تحتاج للنزح أو الاستقاء أو الاصلاح و التنقية و غيرها مما ذكر في مطلق البئر، بل لا مانع من إحياء الموات الذي فوق الآبار و ما بينها إذا أبقي من أطراف حلقها مقدار ما تحتاج اليه لمصالحها، فليس لصاحب القناة المنع عن الاحياء للزرع و غيره فوقها اذا لم يضر بها.

مسألة ١٠ ـ قد مر أن التباعد المزبور في القناة انما يلاحظ بالنسبة إلى البئر التي تكون منبع الماء أو منشأه، و أما الآبار الأخر التي هي مجرى الماء فلا يراعى الفصل المذكور بينها، فلو أحدث الثاني قناة في أرض صلبة و كان منبعها بعيداً عن منبع الأولى بخمسمأة ذراع ثم تقارب في الآبار الأخر التي هي مجرى الماء إلى الآبار الاخر للأخرى إلى أن صار بينها و بينها عشرة أذرع مثلاً لم يكن لصاحب الأولى منعه، نعم لو فرض أن قرب تلك الآبار أضرّ بتلك الآبار من جهة جذبها للماء الجاري فيها أو من جهة أخرى تباعد بما يندفع به الضرر.

مسألة ١١ ـ القرية المبنيّة في الموات لها حريم ليس لأحد إحياؤه، ولو أحياه لم يملكه، و هو ما يتعلق بمصالحها و مصالح أهليها من طرقها المسلوكة منها و إليها و مسيل مائها و مجمع ترابها و كناستها و مطرح سمادها و رمادها و مشرعها و مجمع أهاليها لمصالحهم على حسب مجرى عادتهم و مدفن موتاهم و مرعى ماشيتهم و محتطبهم و غير ذلك ، والمراد بالقرية البيوت و المساكن المجتمعة المسكونة، فلم يثبت هذا الحريم للضيعة و المزرعة ذات المزارع و البساتين المتصلة الخالية من البيوت و المساكن و السكنة، فلو أحدث شخص قناة في فلاة و أحيا أرضاً بسيطة بمقدار ما يكفيه ماء القناة و زرع فيها و غرس فيها النخيل و الأشجار لم يكن الموات المجاور لتلك المحياة حريماً لها، فضلاً عن التلال و الجبال القريبة

decrease in the amount of water despite the said distance, then, according to the more cautious though not stronger opinion the distance may be enhanced in order to avoid the harm, or by mutual agreement with the owner of the former spring and subterranean canal.

Problem # 9. The criterion in the said distance in the subterranean canal is in case of digging another subterranean canal as we have already mentioned.

However, as regards the development of the barren lands around it for farming or construction of a building or the like, there is no objection in it when there is enough land left as required for the drawing or drinking water or repair or cleaning etc. of the well of all kinds.

Rather there is no objection in the development of the barren land above the wells or between them when there is enough land left around it as required for its relevant purposes. So the owner of the subterranean canal shall not be entitled to retrain the development for farming etc. above it when there is no harm in it.

Problem # 10. It has already been mentioned that the said distance in the subterranean canal shall be considered in relation to the well that is the source of its water. However, as regards the other wells that lie on the passage of the water, in their case the said distance shall not be observed.

If another person digs a subterranean canal in a hard land having its source at a distance of five hundred cubits, then some other wells that lie on the passage of water at a distance of, suppose, ten cubits from the other well, the owner of the first well shall not be entitled to restrain it.

Of course, if, suppose, the closeness of these wells is harmful for those wells due to absorbing the water flowing in them or for some other reason, they shall be dug at a distance that may ward off the said harm.

Problem # 11. A village inhabited in a barren land has also adjunct land that cannot be developed by any other person, and if he develops it, it shall not belong to him.

This adjunct land of the village is meant for its relevant services and requirements of its people like roads that they use for treading on them, the space for flossing water, and throwing their dust and dung and manures as well as waste and useless material, their courts and assembling places for their requirements according to their usage, graveyards for burying their dead and pastures for grazing their cattle and storage of their fuel, etc.

A village here means a complex for houses and residences for living. The said adjunct is not established for farms and fields having farms and the gardens adjoining empty places having no houses or residences and inhabitants.

If a person digs a subterranean canal in a jungle and develops a vast land to the extent to suffice the water in the subterranean canal and farming in it and plants palm and other trees in it, the barren lands lying near that developed land shall not be treated as its adjunct land, let alone the adjoining hills and mountains.

Rather if he builds houses and residences in that developed land until it assumes the form of

منها، بل لو أحدث بعد ذلك في تلك المحياة دوراً و مساكن حتى صارت قرية كبيرة يشكل ثبوت الحريم لها، نعم لو أحدثها في جنب المزرعة و البساتين في أراضي الموات فالظاهر ثبوته لها، بل لا يبعد ثبوت بعض الحريم من قبيل مرعى الماشية لها مطلقاً، كما أن للمزرعة بنفسها أيضاً حريماً، و هو ما تحتاج اليه في مصالحهاو يكون من مرافقها من مسالك الدخول و الخروج و محل بيادرها و حظائرها و مجمع سمادها و ترابها و غيرها.

مسألة ١٢ ـ حدّ المرعى الذي هو حريم للقرية و محتطبها مقدار حاجة أهاليها بحسب العادة بحيث لو منعهم مانع أو زاحمهم مزاحم لوقعوا في الضيق والحرج، و يختلف ذلك بكثرة الأهالي و قلتهم و كثرة المواشي و الدوابّ و قلتها، و بذلك يتفاوت المقدار سعة و ضيقاً طولاً و عرضاً.

مسألة ١٣ ـ إن كان موات بقرب العامر و لم يكن من حريمه و مرافقه جاز لكل أحد إحياؤه، و لم يختص بمالك ذلك العامر و لا أولوية له، فاذا طلع شاطىء من الشط بقرب أرض محياة أو بستان مثلاً كان كسائر الموات، فمن سبق إلى إحيائه و حيازته كان له، و ليس لصاحب الأرض أو البستان منعه.

مسألة ١٤ ـ لا إشكال في أن حريم القناة المقدر بخمسمأة ذراع أو ألف ذراع ليس ملكاً لصاحب القناة و لا متعلقاً لحقه المانع عن سائر تصرفات غيره بدون إذنه، بل ليس له إلاّ حق المنع عن إحداث قناة أخرى كما مرّ، و الظاهر أن حريم القرية أيضاً ليس ملكاً لسكانها و أهليها بل انما لهم حق الأولوية، و أما حريم النهر و الدار فهو ملك لصاحب ذي الحريم على تردّد و إن لا يخلو من وجه، فيجوز له بيعه منفرداً كسائر الأملاك .

مسألة ١٥ ـ ما مرّ من الحريم لبعض الأملاك إنما هو فيما إذا ابتكرت في أرض موات، و أما في الأملاك المجاورة فلا حريم لها، فلو أحدث المالكان المجاوران حائطاً في البين لم يكن له حريم من الجانبين، ولو أحدث أحدهما في آخر حدود ملكه حائطاً أو نهراً لم يكن لهما حريم في ملك الآخر و كذا لو حفر أحدهما قناة في

a big village, there shall be hesitation in treating it an adjunct of the his developed land.

Of course, if he inhabits it adjacent to the farms and gardens in the barren land, then apparently it shall be treated as their adjunct.Rather it shall not be far from being some kind of adjunct like pastures for the cattle for it, as there is an adjunct even for a farm itself, and that is the land for its requirements, and they include what is required for its protection as the passage for entrance and exit and places for threshing flour, hedges, space for throwing dust and dung and manures, etc.

Problem # 12. The limit for a pasture that is an adjunct of a village and its space for collection of fuel is the extent of the requirement of its inhabitants according to the usage in a way that if some one restrains them from it or creates obstruction, they would suffer inconvenience and trouble. It differs with the thickness and thinness of the population of the inhabitants as well as their cattle, and with that there is difference in its extent in length and breadth.

Problem # 13. If there is a barren in the vicinity of a developed land, and it is not the adjunct of that developed land and meant to cater for its needs, it shall be allowed to be developed by any one, and it shall neither be exclusively reserved for the owner of the developed land, nor shall he enjoy any preferential right.If a piece of barren land lies adjacent to a developed land or, suppose, a garden, it shall be like other barren lands, so that whoever develops and occupies first shall be its owner, and the owner of the developed land or the garden shall not be entitled to restrain him.

Problem # 14. There is no hesitation in declaring that the adjiunct of a subterranean canal measuring five hundred or one thousand cubits is not the property of the canal's owner, nor shall he have the right to restrain others from making any other changes without his permission. Rather he shall have no right except to restrain the construction of another canal, as already mentioned before. Apparently, the adjunct of the village also is not the property of its residents and inhabitants; rather they have a preferential right.As regards the adjunct of the canal and house, it is the property of the owner of the thing having the adjunct, though with hesitation, even if it is not devoid of significance. So he is allowed to sell it independently like other properties.

Problem # 15. What has been mentioned as an adjunct for some properties, it relates to what happens in a barren land, but as regards the adjoining lands, it has no adjunct in them. So if two adjoining landlords build a wall, it shall not have an adjunct on both sides. If one of them builds a wall or a canal in the end of the limits of his land, there shall be no adjunct of either the wall or canal in the land of the other landlord.

The same shall be the case if either of them digs a subterranean canal in his own property, the other landlord shall be entitled to dig another subterranean canal in his land, even if there is distance between them.

ملكه كان للآخر إحداث قناة أخرى في ملكه و إن لم يكن بينهما الحدّ.

مسألة ١٦ - ذكر جماعة أنه يجوز لكل من المالكين المتجاورين التصرف في ملكه بماشاء وحيث شاء و إن استلزم ضرراً على الجار، لكنه مشكل على إطلاقه، و الأحوط عدم جواز ما يكون سبباً لعروض الفساد في ملك الجار، بل لا يخلو من قرب إلا إذا كان في تركه حرج أو ضرر عليه، فحينئذ يجوز له التصرف، كما إذا دق دقاً عنيفاً انزعج منه حيطان داره بما أوجب خللاً فيها، أو حبس الماء في ملكه بحيث تنشر منه النداوة في حائطه، أو أحدث بالوعة أو كنيفاً بقرب بئر الجار أوجب فساد مائها بل و كذا لو حفر بئراً بقرب بئره إذا أوجب نقص مائها و كان ذلك من جهة جذب الثانية ماء الأولى، و أما إذا كان من جهة أن الثانية لكونها أعمق و وقوعها في سمت مجرى المياه ينحدر فيها الماء من عروق الأرض قبل أن يصل إلى الأول فالظاهر أنه لا مانع منه، و المائز بين الصورتين يدركه أو لوا الحدس الصائب من أهل الخبرة، و كذا لا مانع من إطالة البناء و إن كان مانعاً من الشمس و القمر و الهواء، أو جعل داره مدبغة أو مخبزة مثلاً و إن تأذى الجار من الريح و الدخان إذا لم يكن بقصد الايذاء، و كذا إحداث ثقبة في جداره الى دار جاره موجبة للاشراف أو لانجذاب الهواء فان المحرم هو التطلع على دار الجار لا مجرد ثقب الجدار.

مسألة ١٧ - لايخفى أن أمر الجار شديد، وحث الشرع الأقدس على رعايته أكيد، و الأخبار في وجوب كف الأذى عن الجار و في الحث على حسن الجوار كثيرة لا تحصى، فعن النبي صلى الله عليه و آله أنه قال: «ما زال جبرئيل يوصيني بالجار حتى ظننت أنه سيورثه» و في حديث آخر «أنه صلى الله عليه و آله أمر علياً عليه السلام و سلمان و أباذر -قال الراوي: و نسيت آخر و أظنه المقداد- أن ينادوا في المسجد بأعلى اصواتهم بأنه لا إيمان لمن لم يأمن جاره بوائقه، فنادوا بها ثلاثاً» و في الكافي عن الصادق عن أبيه عليهما السلام قال: «قرأت في كتاب علي عليه السلام أن رسول الله صلى الله عليه و آله كتب بين

Problem # 16. A group of jurists has said that each of the two neighbouring landlords is allowed to make any changes in his respective property as and where ever he likes, even if causes harm to the other landlord, but it is difficult to accept in all circumstances, and according to the more cautious opinion it should not be allowed if it causes harm to the property of the neighbouring landlord; rather, it is not far from being close to the traditional authority except when giving it up would entail some harm or loss to him, in which case he shall be entitled to bring the change, as when a person puts a nail into his well with such a force that it causes a shock in the walls of the neighbour, leading to the creation of a crack in it, or when he collects water in his property that dampens the wall of the neighbour, or digs a sewer or a toilet near the well of the neighbour that turns its water dirty rather, even if he digs a well close to the neighbour's well causing a decrease in its water due to the second well drawing the water of the first well.

If, however, it is due to the second well being deeper and it is lying on the way of the passage of water springing from its roots underneath the earth and reaching it before the first well, then apparently there shall be no objection in it. A distinction can be made between these two cases only by those who are experts.

Likewise, there is no objection in raising a building higher even if it obstructs sunlight, moonlight or air. Similarly there is no objection in having, for example, a tanning factory or a bakery in one's house, even if its air or smoke is troublesome, provided it is not deliberately done to create trouble for the neighbour.

The same is the case with the opening of a hole in one's wall, digging into the neighbour's wall, causing a source of peeping into the neighbour's house or drawing air from it, as what is forbidden is peeing into the neighbour's house, not merely opening a hole in a wall.

Problem # 17. It is not a secret that the problem dealing with a neighbour is a difficult one, and so the holy *Sharī'ah* has laid strong emphasis on the fulfilment of the neighbour's rights. There are innumerable Traditions in favour of the obligation of avoiding inconvenience to one's neighbour and for exhorting the people to maintain good behaviour with him. So it has been reported from the Prophet, PBUH, that he has said: "Gabriel has been incessantly exhorting me to behave well with the neighbour until I assumed that he will declare him one of the heirs." Another Tradition says: " The holy Prophet, PBUH, ordered 'Alī, Salmān, Abū Dhar, the reporter says that he forgotten the name of the fourth, who was presumably Miqdād, that they should announce with their loudest voice in the mosque that he shall have no faith from whose harm his neighbour is not safe. So they announced it thrice." It has been reported in *Al-Kāfī* through (Imām Ja'far) al-Ṣādiq from his father, (Imām Muḥammad al-Bāqir), Peace be on both of them, "I have read in the Book of 'Alī, Peace be upon him, that the holy Messenger of Allāh, PBUH, wrote to the *Muhājirs* and *Anṣār*, and those affiliated to them from among the inhabitants

المهاجرين و الأنصار و من لحق بهم من أهل يثرب أن الجار كالنفس غير مضار ولاآثم، وحرمة الجار على الجار كحرمة أمّه» و روى الصدوق باسناده عن الصادق عن علي عليهما السلام عن رسول الله صلى الله عليه و آله قال: «من آذى جاره حرّم الله عليه ريح الجنّة و مأواه جهنم و بئس المصير، و من ضيع حق جاره فليس منّا» و عن الرضا عليه السلام «ليس منّا من لم يأمن جاره بوائقه» و عن الصادق عليه السلام أنه قال والبيت غاص بأهله: «إعلموا أنه ليس منّا من لم يحسن مجاورة من جاوره» وعنه عليه السلام قال: قال رسول الله صلى الله عليه و آله: «حسن الجوا ريعمّر الديار و ينسيء في الأعمار» فاللازم على كل من يؤمن بالله و رسوله(ص) و اليوم الآخر الاجتناب عن كل ما يؤذي الجار و إن لم يكن مما يوجب فساداً أو ضرراً في ملكه إلا أن يكون في تركه ضرر فاحش على نفسه، و لا ريب أن مثل ثقب الجدار الموجب للاشراف على دار الجار إيذاء عليه، و أيّ إيذاء، و كذا إحداث ما يتأذى من ريحه أو دخانه أو صوته أو ما يمنع عن وصول الهواء اليه أو عن إشراق الشمس عليه و غير ذلك.

مسألة ١٨ ـ يشترط في التملك بالاحياء أن لا يسبق اليه سابق بالتحجير، فان التحجير يفيد أولوية للمحجر، فهو أولى بالاحياء و التملك من غيره، فله منعه، ولو أحياه قهراً على المحجر لم يملكه، و المراد بالتحجير أن يحدث ما يدل على إرادة الاحياء كوضع أحجار أو جمع تراب أو حفر أساس أو غرز خشب أو قصب أو نحو ذلك في أطرافه وجوانبه، أو يشرع في إحياء ما يريد إحياءه، كما إذا حفر بئراً من آبار القناة الدارسة التي يريد إحياءها، فانه تحجير بالنسبة الى سائر آبار القناة، بل و بالنسبة الى أراضي الموات التي تسقى بمائها بعد جريانه، فليس لأحد إحياء تلك القناة و لا إحياء تلك الأراضي، و كذا إذا أراد إحياء أجمة فيها الماء و القصب فعمد على قطع مائها فقط فهو تحجير لها، فليس لأحد إحياؤها بقطع قصبها.

مسألة ١٩ ـ لابد من أن يكون التحجير مضافاً إلى دلالته على أصل الاحياء

of Yathrib that a neighbour is like one's self provided that he is one not causing any harm or committing a sin. The respect a person owes to a neighbour is like the respect he owes to his mother."

It has been reported by Ṣadūq through his line of narrators from [Imām Ja'far] al-Ṣādiq who has reported it through [Imām] 'Alī, Peace be on both of them, from the Messenger of Allāh, PBUH that he has said: "Whoever hurt his neighbour, Allāh shall ban the wind of Paradise on him, and his place shall be in the Hell, and that is an evil place. Whosoever treads upon the right of his neighbour shall not belong to our community." It has been reported from [Imām Alī'] al-Riḍā, Peace be on him: "He is not from among our community whose neighbour is not safe from his harm." It has been reported from [Imām Ja'far] al-Ṣādiq, while his house was jammed with his people: "Know you all that he does not belong to our community who does not behave well with his neighbour." It is also reported from him that the Messenger of Allāh has said: "A good neighbourhood prospers the dwellers and obliterates the ages." Therefore it is binding on all those who believe in Allāh and his Messenger,(PBUH), and the Day of Judgement to abstain from everything that harms the neighbour, if it is not something that causes harm or damage to his own property, except when there is some open harm for himself in giving it up. No doubt making a hole into the wall bringing within sight the neighbour's house is a source of annoyance for him, and what can be q worse annoyance for him. Similar is the case with the construction of what annoys him due to its air, smoke, or sound or what obstruct the supply of air or sunlight to him, or the like.

Problem # 18. It is a condition for the ownership through development [of a barren land] that the land should not have been previously occupied by someone else, as the occupation (*taḥjīr*) of a barren land gives a preferable right to the occupier. So he possesses a better right for its development and ownership than the other, and is entitled to restrain him, so that if another person develops it by overwhelming the occupier, he shall not own it. By occupation here is meant construction of something that signifies the intention of development as placing stones or soil, digging a foundation, fix reeds or planks around it, or start developing the land he intends to develop, as when he digs a well in a worn out subterranean canal that he intends to develop, as it shall be treated as occupation in relation to the other wells of subterranean canal, rather also in relation to the wasteland irrigated by it after its water has started flowing. So no one else shall be allowed to develop that subterranean canal or that land.

The same shall be the case if a person intends to develop a forest in which there is water and reeds, and he intends to drain out the water, it shall be treated as its occupation, so that no one else shall be entitled to develop it by cutting its reeds.

Problem # 19. It is indispensable that the occupation must include the amount of land he intends to develop in addition to its proof for the development itself. So if there is occupation, for example, by placing stones or soil or fixing reeds or planks, it is indispensable that it must be done from all sides [of the land] s a sign of his intention of developing the land.

Of course, in the case of developing a worn out subterranean canal, it is sufficient to start digging one of its wells as mentioned earlier. According to the prevalent custom, it is a proof of his intention of developing the whole subterranean canal, rather even the adjoining land.

دالاً على مقدار ما يريد إحياءه، فلو كان ذلك بوضع الأحجار أو جمع التراب أو غرز الخشب أو القصب مثلاً لابد أن يكون ذلك في جميع الجوانب حتى يدل على أن جميع ما أحاطت به العلامة يريد إحياءه، نعم في مثل إحياء القناة البائرة يكفي الشروع في حفر إحدى آبارها كما أشرنا إليه آنفاً، فانه دليل بحسب العرف على كونه بصدد إحياء جميع القناة، بل الأراضي المتعلقة بها أيضاً، بل إذا حفر بئراً في أرض موات بالأصل لأجل إحداث قناة يمكن أن يقال: إنه يكون تحجيراً بالنسبة إلى أصل القناة و إلى الأراضي الموات التي تسق بمائها بعد تمامها و جريان مائها، فليس لأحد إحياء تلك الجوانب حتى يتم القناة و يعين ما تحتاج إليه من الأراضي نعم الأرض الموات التي ليست من حريم القناة و ممّا علم أنه لايصل إليها ماؤها بعد جريانه لا بأس باحيائها.

مسألة ٢٠ ـ التحجير كما أشرنا اليه يفيد حق الأولوية ولا يفيد الملكية، فلا يصح بيعه على الأحوط و إن لا يبعد الجواز، نعم يصح الصلح عنه، و يورث و يقع ثمناً في البيع، لأنه حق قابل للنقل و الانتقال.

مسألة ٢١ ـ يشترط في مانعية التحجير أن يكون المحجر متمكناً من القيام بتعميره ولو بعد زمان طويل بشرط أن لا يوجب تعطيل الموات، فلو حجر من لم يقدر على إحياء ما حجره إما لفقره أو لعجزه عن تهيئة أسبابه فلا أثر لتحجيره، وجاز لغيره إحياؤه، وكذا لو حجر زائداً على مقدار تمكنه من الاحياء لا أثر لتحجيره إلا في مقدار ما تمكن من تعميره و أما في الزائد فليس له منع الغير عن إحيائه، فعلى هذا ليس لمن عجز عن إحياء الموات تحجيره ثم نقل ما حجره الى غيره بصلح أو غيره مجاناً أو بالعوض، لأنه لم يحصل له حق حتى ينقله إلى غيره.

مسألة ٢٢ ـ لا يعتبر في التحجير أن يكون بالمباشرة، بل يجوز أن يكون بتوكيل الغير أو استئجاره، فيكون الحق الحاصل بسببه ثابتاً للموكل و المستأجر لا للوكيل و الأجير، و أما كفاية وقوعه عن شخص نيابة عن غيره ثم أجاز ذلك الغير في ثبوته للمنوب عنه فبعيد.

Rather when a person digs a well in the barren land itself for the development of the subterranean canal, it may be said that it shall be tantamount to occupation in relation to the subterranean canal itself and in relation to the barren land that is to be watered after its completion and after the flowing of its water. So no one else shall be allowed to develop the area around it until the subterranean canal is completed and the amount of land required for it is determined.

Of course, the barren land is not a *Ḥárīm* of the subterranean canal, and out of it the land where if the water does not reach it, after it has started flowing, there shall be no objection in developing it.

Problem # 20. As pointed out, an occupation brings preferable right of development, not the right of ownership. So, according to the more cautious opinion, it is not lawful to sell it, though it is not far from being permissible.

Of course, it is lawful to make a conveyance, that can be inherited, and there shall be price in case of its sale, as it is title that is transferable and one that can be received.

Problem # 21. It is a condition for restraint in an occupation that the occupier must be capable to act for its development, even if after a long time, provided that he does not leave the barren land altogether undeveloped. If a person occupies an area of land that he is not able to develop what he has occupied due to his poverty or inability to provide the means for its development, then the occupation shall have no effect, and another person shall be allowed to develop it.

The same shall be the case if he has occupied more than his capacity to develop, his occupation shall have no effect except up to the extent of his capacity to develop.

As regards the excess, he shall have no right to restrain others from its development. Therefore if one who has failed to develop, and so having no right of occupation, transfers what he has occupied to another by conveyance or otherwise, with or without any payment, he shall not be entitled to do so, as he has not obtained the right so that he may transfer it to another.

Problem # 22. It is not a condition in occupation (*Taḥjīr*) that it must be done personally. Rather it can be done through an agent or one hired for it, in which case the right shall go to the principal or the hirer and not to the agent or the hired person.

If occupation by a person takes place as an agent of another and then the principal allows occupation by the agent, it shall be far from being sufficient.

Problem # 23. If the signs of occupation itself are obliterated before the occupier acts for the development, his right shall be void, and the barren land shall be restored to its position prior to the occupation. If it was due to the act of a person other than the occupier, it shall not be far from being intact provided that the time of obliteration has not been long. If the time of obliteration has been long, it shall be void absolutely. It is not far from being intact if the right has obliterated by itself, when it was not

مسألة ٢٣ ـ لو انمحت آثار التحجير بنفسها قبل أن يقوم المحجر بالتعمير بطل حقه و عاد الموات إلى ما كان قبل التحجير، و أما لو كان بفعل شخص غيرالمحجر فلا يبعد بقاؤه مع قرب زمان المحو، و مع طول المدة فالظاهر بطلانه مطلقاً، بل لا يبعد بقاء الحق مع المحو بنفسها إذا لم يكن ذلك لطول مدة التعطيل، كما لو حصل بالسيل أو الريح مثلاً.

مسألة ٢٤ ـ ليس للمحجر تعطيل الموات المحجر عليه و الاهمال في التعمير، بل اللازم أن يشتغل بالعمارة عقيب التحجير، فان أهمل وطالت المدة و أراد شخص آخر إحياءه فالأحوط أن يرفع الأمر الى الحاكم مع وجوده و بسط يده، فيلزم المحجر بأحد أمرين: إما العمارة أو رفع يده عنه ليعمره غيره، إلاّ أن يبدىء عذراً موجهاً مثل انتظار وقت صالح له أو إصلاح آلاته أو حضور العملة، فيمهل بمقدار ما يزول معه العذر، و ليس من العذر عدم التمكن من تهيئة الأسباب لفقره منتظراً للغنى و التمكن إلا إذا كان متوقعاً حصوله بحصول أسبابه، فاذا مضت المدة في الفرض المتقدم و لم يشتغل بالعمارة بطل حقه و جاز لغيره القيام بالعمارة، و اذا لم يكن حاكم يقوم بهذه الشؤون فالظاهر أنه يسقط حقه أيضاً لو أهمل في التعمير و طال الاهمال مدة طويلة يعدّ مثله في العرف تعطيلاً، فجاز لغيره احياؤه و ليس له منعه، والأحوط مراعاة حقه ما لم تمض مدة تعطيله واهماله ثلاث سنين.

مسألة ٢٥ ـ الظاهر أنه يشترط في التملك بالاحياء قصد التملك كالتملك بالحيازة مثل الاصطياد و الاحتطاب و الاحتشاش و نحوها، فلو حفر بئراً في مفازة بقصد أن يقضي منها حاجته مادام باقياً لم يملكه، بل لم يكن له الا حق الأولوية مادام مقيماً، فاذا ارتحل زالت تلك الأولوية و صارت مباحاً للجميع.

مسألة ٢٦ ـ الاحياء المفيد للملك عبارة عن جعل الأرض حية بعد الموتان و إخراجها عن صفة الخراب إلى العمران، ومن المعلوم أن عمارة الأرض إما بكونها مزرعاً أو بستاناً، و إما بكونها مسكناً و داراً، و إما حظيرة للأغنام والمواشي، أو

due to the length of the time the land has remained undeveloped, as, for example, when it has been due to flood or violent winds.

Problem # 24. An occupier is not allowed to leave the barren land occupied by him undeveloped or neglect its development; rather he is bound to take up its development just after the occupation. If he neglects its development and a long time passes and another person intends to develop it, he shall refer the case to a judge, if there is one and is competent to take action. Then the occupier shall have to do either of the following two things, namely, either he should take up its development or abandon it so that the other may develop it, except when he forwards a due excuse as waiting for a suitable time, repair of his implements or the workers. He shall be granted time enough to meet his excuse. The excuse, however, must not include his inability to provide means due to his poverty and waiting till gaining affluence and capability, except when there is hope of its attainment with the attainment of the means. If the supposed time elapses, and he fails to engage in the development, he shall lose the title, and another person shall be allowed to act for development. If there is no judge to act in such matters, then apparently he shall forfeit the right if he commits negligence in development, and the delay has been too long to be considered tantamount to abandoning it according to the prevalent custom. In such case, another person shall be allowed to develop it, and he shall not be entitled to restrain him. According to the more cautious opinion, his right must be maintained until the lapse of three years since he has left the land undeveloped and has committed negligence.

Problem # 25. Apparently it is a condition for the ownership by development that there must be the intention of ownership by possession as hunting or collection of fuel wood or grass, or the like. If a person digs a well in wilderness to fulfil his need as long as he was there, he shall not become its owner. Rather he shall have nothing but preferential right as long he stays there. So on his death, his preferential right shall cease, and it shall become lawful for the people at large.

Problem # 26. By a development leading to ownership is meant the development of land after it had become barren and taking it out of the position of a wasteland into a developed one. It is understood that development of a land is either done by farming or gardening, or by building a house or a shed for sheep and cattle or using it for other purposes as drying fruits or storing fuel, etc.

So in order that it may be considered development of barren lands, it is indispensable that an exercise must be made in it and finalised in a way that it may be treated as one of the forms of development as, for example, when, according to the prevalent custom, the name of a farm or house, etc. is applicable to it, and it is sufficient for its proof that the preliminary stage must have been fulfilled, and it is not a condition that it should be completed till the final stage. But before it reaches that stage and whatever is planned to build in it is built in it, it shall not be called development but mere

لحوائج أخر كتجفيف الثمار أو جمع الحطب أو غير ذلك ، فلابد في صدق إحياء الموات من العمل فيه و إنهائه الى حدّ صدق عليه أحد العناوين العامرة بأن صدق عليه المزرع أو الدار مثلاً أو غيرهما عند العرف، و يكفي تحقق أول مراتب وجودها، و لا يعتبر انهاؤها الى حد كمالها، و قبل أن يبلغ الى ذلك الحد و ان صنع فيه ما صنع لم يكن احياء بل يكون تحجيراً، و قد مر أنه لا يفيد الملك بل لا يفيد الا الأولويّة.

تكملة :

يختلف ما اعتبر في الاحياء باختلاف العمارة التي يقصدها المحيي، فما اعتبر في احياء الموات مزرعاً أو بستاناً غير ما اعتبر في احيائه مسكناً و داراً، و ما اعتبر في احيائه قناة أو بئراً غير ما اعتبر في احيائه نهراً و هكذا و يشترط في الكل ازالة الأمور المانعة عن التعمير كالمياه الغالبة أو الرمال و الأحجار أو القصب والأشجار لو كانت متأجمة و غير ذلك ، و يختص كل منها ببعض الأمور، و نحن نبينها في ضمن مسائل.

مسألة ١ ـ يعتبر في إحياء الموات داراً أو مسكناً بعد إزالة الموانع لو كانت أن يدار عليه حائط بما يعتاد في تلك البلاد ولو كان بخشب أو قصب أو حديد أو غيرها، و يسقف ولو بعضه مما يمكن أن يسكن فيه، ولا يعتبر فيه مع ذلك نصب الباب، و لا يكفي إدارة الحائط بدون التسقيف، نعم يكفي ذلك في إحيائه حظيرة للغنم و غيره، أو لأن يجفف فيه الثمار أو يجمع فيه الحشيش و الحطب، ولو بنى حائطاً في الموات بقصد بناء الدار وقبل أن يسقف عليه بدا له و قصد كونه حظيرة ملكه كما لو قصد ذلك من أول الأمر، و كذلك ملكه في العكس بأن حوطه بقصد كونه حظيرة فبدأ له أن يسقفه و يجعله داراً.

مسألة ٢ ـ يعتبر في إحياء الموات مزرعاً بعد إزالة الموانع تسوية الأرض لو

occupation, and it has already been mentioned that it does not bring ownership but mere preferential right.

SUPPLEMENT

The conditions required in reclamation differ with the difference of the development intended by the developer. The conditions required in the reclamation of the wasteland for farming or gardening are different from those required for reclamation for the purpose of residence or house. Likewise, the conditions required in the reclamation of subterranean canals or wells are different from those required in the reclamation for a canal, and so on. In all cases initially it is a condition to remove all the obstacles in the way of development as overflowing water, sand and stones or reeds and trees if there is a cluster of reeds or trees, etc. Each of them requires some particular considerations, and we shall mention them during the discussion on the relevant Problems.

Problem # 1. In the reclamation of a wasteland for building a mansion or a house, it is a condition after removing the obstacles, if any, to build an enclosing wall as is usual in that area, whether it is of wood, bamboo or iron, etc., and also erect a roof on it, even if partially, where one may reside in it. It is, however, not necessary to install a gate. It is, however, not enough to build an enclosing wall without erecting a roof.

Of course, it shall be enough in case of reclamation for the construction of an enclosure for goats and sheep, etc., or it is meant for drying fruits or storing fodder or wood in it.

If a person erects a wall with the intention of building a house, but before covering it with a roof, he changes his intention, and intends to make it an enclosure for cattle, he shall be its owner, as would have been the case had had the same intention initially.

Likewise, he shall be the owner in case otherwise, so that he builds an enclosing wall for erecting an enclosure for cattle, but later he changes his intention and turns it into a house.

Problem # 2. In the reclamation for the purpose of farming, it is a condition after the removal of the obstacles to level the land if there is a pit or mound obstructing it to be suitable for farming, and arrange water for it, either by digging a canal from the river or drilling a subterranean canal or a well. Thereby its reclamation is accomplished, and it becomes a property of the developer. It is not a condition in it to plough the land let alone sowing seed in it.

If it is a land where there is no need of or arranging water for farming, as the rain water is

كانت فيها حفر و تلال مانعة عن قابليتها للزرع وترتيب مائها اما بشق ساقية من نهر أو حفر قناة لها أو بئر، و بذلك يتم احياؤها و يملكها المحيي، و لا يعتبر في احيائها حرثها فضلاً عن زرعها، و ان كانت الأرض مما لا تحتاج في زراعتها الى ترتيب ماء لأنه يكفيها ماء السماء كفى في احيائها اعمال الأمور الأخر عدا ترتيب الماء، و ان كانت مهيأة للزرع بنفسها بأن لم يكن فيها مانع عنه مما ذكر ولم تحتج الا الى سوق الماء كفى في احيائها ادارة التراب حولها مع سوق الماء اليها، و ان لم تحتج الى سوق الماء أيضاً من جهة أنه يكفيها ماء السماء كبعض الأراضي السهلة و التلال التي لا تحتاج في زرعها الى علاج وقابلة لأن تزرع ديمياً فالظاهر أن احياء ها المفيد لتملكها انما هو بادارة المرز حولها مع حرثها و زرعها، بل لا يبعد الاكتفاء بالحرث في تملكها، و أما الاكتفاء بالمرز من دون حراثة و زراعة ففيه اشكال، نعم لا إشكال في كونه تحجيراً مفيداً للأولوية.

مسألة ٣ - يعتبر في إحياء البستان كل ما اعتبر في إحياء الزرع بزيادة غرس النخيل أو الأشجار القابلة للنمو، و لا يعتبر التحويط حتى في البلاد التي جرت عادتهم عليه على الأقوى، بل الظاهر عدم اعتبار السقي أيضاً، فمجرد غرس الأشجار القابلة للنمو كاف فيه.

مسألة ٤ - يحصل إحياء البئر في الموات بأن يحفر ها الى أن يصل الى الماء، فيملكها بذلك ، و قبل ذلك يكون تحجيراً لا إحياء، و احياء القناة بأن يحفر الآبار الى أن يجري ماؤها على الأرض، و احياء النهر بحفره و انهائه الى الماء المباح كالشط و نحوه بحيث كان الفاصل بينهما يسيراً كالمرز و المسناة الصغيرة. و بذلك يتم إحياءالنهر، فيملكه الحافر، و لا يعتبر فيه جريان الماء فيه فعلاً و ان اعتبر ذلك في تملك المياه.

القول في المشتركات

وهي الطرق و الشوارع و المساجد و المدارس و الرباطات و المياه و المعادن.

sufficient for it, it shall be sufficient for its reclamation to complete other conditions except arrangement of water. If it is already ready for farming so that there is neither any obstacle in it as mentioned earlier nor does it need anything except supply of water, then it shall be sufficient in its reclamation to arrange the soil around it along with supply of water in it.

If it also does not require supply of water due to the fact that rain water is sufficient for it, as is the case in some level and high lands that do not require for farming in them treatment, and they are ready for dry farming. Then apparently it is sufficient for their reclamation for ownership that a boundary may be made around it along with ploughing and sowing seed in it.

Rather it is not far from being sufficient to plough in it for its ownership. However, there is hesitation in mere arrangement of a boundary without ploughing and sowing seed in being sufficient for its ownership.

Of course, there is no hesitation in the boundary being beneficial in giving a preferential right to the person.

Problem # 3. In the reclamation of a wasteland for a garden, all that is required in the reclamation of a land for farming holds good with the addition of planting palm or other trees having the capacity to grow.

It is not a condition to erect four walls even in places where it is usual to erect four walls around a garden, according to the stronger opinion. Rather it is not a condition to irrigate it. Mere plantation of trees having capacity to grow is sufficient in it.

Problem # 4. The reclamation of a wasteland for drilling a well in is accomplished by digging the well until it reaches the source of water, and thereby it becomes the property of the digger of well, but before that it has a preferential right for him but not a right of reclamation. For the reclamation for the drilling of subterranean canals, it is sufficient to dig the channels till the water reaches the surface of the land.

The reclamation of a canal is accomplished by digging it and linking it with the free source of water like a big river or the like in a way that there must a short distance between both of them as the bank and small flood embankments, and thereby the reclamation of the canal is accomplished, and it becomes the property of the digger. Instant flow of water is not a condition for its ownership, though it is a condition for the ownership of the water.

Chapter Two - Public Properties (*Mushtarakāt*)

By *Mushtarakāt* or Public Properties is meant the public thoroughfare, highways, mosques, inns, sources of water and mines.

Problem # 1. A road is of two types: a thoroughfare and a blind alley. The first type is called a public highway, meant for the general public, all the people having an equal right to use it, with no individual being entitled to reclaim it or reserve it for himself, there being no right to any one in its land to build a

مسألة ١ ـ الطريق نوعان نافذ وغير نافذ، فالأول ـ و هو المسمى بالشارع العام ـ محبوس على كافة الأنام، و الناس فيه شرع سواء، و ليس لأحد إحياؤه و الاختصاص به، ولا التصرف في أرضه ببناء دكة أو حائط أو حفر بئر أو غرس شجر أو غير ذلك، نعم لا يبعد جواز غرس الأشجار و احداث النهر لمصلحة المارة لو كان الطريق واسعاً جداً كالشوارع الوسيعة المستحدثة في هذه الأعصار، كما أن الظاهر أنه يجوز أن يحفر فيه بالوعة ليجتمع فيها ماء المطر و غيره لكونها من مصالحه و مرافقه، لكن مع سدها في غير أوقات الحاجة حفظاً للمستطرقين و المارة، بل الظاهر جواز حفر سرداب تحته إذا أحكم الأساس و السقف بحيث يؤمن معه من النقض و الخسف، و أما التصرف في فضائه باخراج روشن أو جناح أو بناء ساباط أو فتح باب أو نصب ميزاب و نحو ذلك فلا إشكال في جوازه إذا لم يضر بالمارة، و ليس لأحد منعه حتى من يقابل داره داره، كما مر في كتاب الصلح.

و أما الثاني ـ أعني الطريق غير النافذ المسمى بالسكة المرفوعة، وقد يطلق، عليه الدريبة و هو الذي لا يسلك منه إلى طريق آخر أو مباح بل أحيط بثلاث جوانبه الدور والحيطان و الجدران ـ فهو ملك لأرباب الدور التي أبوابها مفتوحة إليه دون من كان حائط داره إليه من غير أن يكون بابها إليه، فيكون هو كسائر الأملاك المشتركة يجوز لأربابه سده و تقسيمه بينهم و إدخال كل منهم حصته في داره، ولا يجوز لأحد من غيرهم بل و لا منهم أن يتصرف فيه و لا في فضائه إلا باذن من يعتبر إذنه كما يأتي في المسألة الآتية.

مسألة ٢ ـ لا يبعد في الدريبة أن يشارك الداخل للأدخل إلى قبالة بابه مما هو ممره مع ما يتعارف من المرافق المحتاج اليها نوعاً، و لا يبعد أن يشارك الداخل الى منتهى جدار داره و ينفرد الأدخل بما بعده، ومع تعدد الشركاء يشارك الأدخل من الجميع معهم، و ينفرد بما يكون طريقه الخاص، فيشترك الجميع من أول الدريبة الى الباب الأول أو منتهى الجدار ثم يشترك فيما عداه ما عدا صاحب

platform or a wall, dig a well, or plant a tree, etc.

Of course, it is not far from being lawful to plant trees or make canals for the interests of the passers-by if the road is quite wide as the wide public highways in the modern times, in the same way as apparently it is also lawful to prepare drains for the collection of rain water, etc., being in the interest and benefit of the people, with the condition that it should be covered except in times of need for the protection of those living nearby or the passers-by.

Rather apparently it is also permissible to build a basement under it provided it has such a strong foundation and roof that they are safe from falling or caving in.

As regards the use of its air space by erecting a skylight or wings or building an archway or opening a gate or installing a rain pipe or the like, there is no hesitation in its permission in case it is not harmful for the passers-by, and no one is entitled to forbid it even by one having his house opposite the house of the person erecting it, as has already been mentioned under the Section on Compromise (*Ṣulḥ*).

As regards the second type, i.e., a blind alley, called side-streets, or the alleys having houses on one side through which no one can pass through the other end or a public place. They are alleys having rows of houses, enclosures or walls on three sides of them. They are the property of the persons having their houses the doors of which open in them except those having the wall of their houses without any doors opening in them.

They are like all other public properties, their owners having the right to close them or divide them among themselves, or all of them including part of their share in their house, but this is not permissible for any one other than themselves, rather not even any one among them to make any change in them or their air space except with the permission of those who are authorized to give such permission, as will be mentioned in the next Problem.

Problem # 2. In case of blind alleys, it is not far from being likely that the person having inside them may share with the other having house next to him as much as it is opposite his gate from which he passes according to the usual custom as part of the facilities that are in a way-needed.

It is also not far from likely that the person having his house within the alleys should share the inside part until the end of the wall of his house, and what remains after it should belong exclusively the one having his house after his house, and in case of there being several partners, the one having his house in the last should share with all the others, and should own exclusively only that which is his particular way.

الباب الأول، و هكذا تقلّ الشركاء إلى آخر الزقاق و لا يبعد اختصاص الآخر بالفضلة التي في آخر الزقاق، فيجوز لمن هو أدخل من الجميع أيّ تصرف شاء فيما ينفرد به، بل و في الفضلة المذكورة و لا يجوز لغيره التصرف كاخراج جناح أو روشن أو بناء ساباط أو حفر بالوعة أو سرداب أو نصب ميزاب و غير ذلك إلا باذن شركائه، نعم لكل منهم حق الاستطراق إلى داره من أيّ موضع من جداره، فلكل منهم فتح باب آخر أدخل من بابه الأول أو أسبق مع سد الباب الأول و عدمه.

مسألة ٣ ـ ليس لمن كان حائط داره الى الدريبة فتح باب اليها إلا باذن أربابها، نعم له فتح ثقبة و شباك اليها، و ليس لهم منعه، لكونه تصرفاً في جداره لا في ملكهم، و هل له فتح باب اليها لا للاستطراق بل لمجرد الاستضاءة و دخول الهواء؟ الأقرب جوازه، و لصاحب الدريبة تحكيم سند المالكية لدفع الشبهة.

مسألة ٤ ـ يجوز لكل من أرباب الدريبة الجلوس فيها و الاستطراق و التردد منها الى داره بنفسه و ما يتعلق به من عياله ودوابه و أضيافه و عائديه و زائريه، و كذا وضع الحطب و نحوه فيها لإدخاله في الدار، و وضع الأحمال و الأثقال عند إدخالها و اخراجها من دون إذن الشركاء، بل و ان كان فيهم القصّر و المولى عليهم من دون رعاية المساواة مع الباقين.

مسألة ٥ ـ الشوارع و الطرق العامة و ان كانت معدة لاستطراق عامة الناس و منفعتها الأصلية التردد فيها بالذهاب و الاياب إلا أنه يجوز لكل أحد الانتفاع بها بغير ذلك من جلوس أو نوم أو صلاة و غيرها بشرط أن لا يتضرر بها أحد على الأحوط، و لم يزاحم المستطرقين و لم يتضيق على المارة.

مسألة ٦ ـ لا فرق في الجلوس غير المضر بين ما كان للاستراحة أو النزهة و بين ما كان للحرفة و المعاملة اذا جلس في الرحاب و المواضع المتسعة لئلا يتضيق على المارة، فلو جلس فيها بأيّ غرض من الأغراض لم يكن لأحد

So all of them share from the first house of the blind alley to the first gate or the last part of the wall. After that all shall share except the one having the first gate. In this way the number of the partners shall fall until the end of the alley.

It is not far from being likely that what remains in the last should be reserved for the one having his house in the end of the alley, and the one having the innermost house than others can make any use he likes exclusively meant for him, rather also in the remaining portion already mentioned, but no one else is entitled to make use of it by opening wings, or skylight, or building an archway, a platform or a basement, etc. except with the permission of his other partners. Of course, each of them has a right of passage to his house from whatever part of his wall, and each of them has the right to open another door further inside than the first or former one with or without closing the first one.

Problem # 3. No one having a wall of his house towards the blind alley has the right to open a door in the wall without the permission of the owners of the house in the blind alley.

Of course, he is allowed to open a hole or a skylight in it, and no one else is entitled to prevent him from doing so, as it is a change in his own wall and not in their property. Is he allowed to open a door in it not for passage, but merely for getting light or air? According to the opinion closer to the traditional authority, he is allowed to do so, while the owner of the blind alley is entitled to strengthen his property deed in order to remove any doubt.

Problem # 4. Each of the landlords of the blind alley has the right to sit it, have passage or transit from it to his house for himself, his family members, cattle, guests, visitors, or for placing fuel wood or the like for taking it into his house, or placing loads or heavy things at the time of taking them into or from his house without the permission of his partners.

Rather even if there are some minors or those under guardianship among them without observing equal treatment with them.

Problem # 5. The highways and public thoroughfares, though constructed for the transit of the public at large, their basic benefit being their use for the public traffic, but they are allowed to be used for other purpose as well, as sitting, sleeping and offering prayers, etc., provided that, according to the more cautious opinion, they are not harmful for any one, and not a source of disturbance or inconvenience for the passers-by.

Problem # 6. There is no difference in sitting without harm whether it is for rest and recreation or for some trade or commercial transaction, provided one sits in a broad and vast places so that it may not cause any inconvenience to the passers-by. If a person sits in it for whatever purpose, no one else has the right to remove him.

Problem # 7. If a person sits in any part of the public thoroughfare, and then gets up from there, then if his sitting was for rest or the like, he loses his right (of its occupation), and another person shall be entitled to sit there. Likewise, if he sits thee for some trade or commercial transaction, and gets up after fulfilling his purpose and without any intention to come back, then if he returns after another person has

إزعاجه.

مسألة ٧ ـ لو جلس في موضع من الطريق ثم قام عنه فان كان جلوس استراحة و نحوها بطل حقه، فجاز لغيره الجلوس فيه، وكذا ان كان لحـرفة ومعاملة وقام بعد إستيفاء غرضه و عدم نية العود، فلو عاد اليه بعد أن جلس في مجلسه غيره لم يكن له دفعه، ولو قام قبل استيفاء غرضه ناوياً للعود ففي ثبوت حق له فيه إشكال، نعم لا يجوز التصرف في بساطه فلو قام، ولو بنيّة العود دو رفع بساطه فالظاهر جواز جلوس غيره مكانه، والاحتياط حسن.

مسألة ٨ ـ ثبوت الحق للجالس للمعاملات و نحوها مشكل، بل الظاهر عدمه، لكن لا يجوز إزعاجه مادام فيه و لا التصرف في بساطه، و لا مانع من إشغال ما حوله ولو احتاج اليه لوضع متاعه و وقوف المعاملين معه، و كذا يجوز له القعود بحيث يمنع من رؤية متاعه أو وصول المعاملين اليه، وليس له منعه، لكن الاحتياط حسن، و مراعاة المؤمن مطلوب.

مسألة ٩ ـ يجوز للجالس للمعاملة أن يظلل على موضع جلوسه بما لا يضر بالمارة بثوب أو بارية و نحوهما، وليس له بناء دكة و نحوها فيه.

مسألة ١٠ ـ إذا جلس في موضع من الطريق للمعاملة في يوم فسبقه في يوم آخر شخص آخر و أخذ مكانه فليس للأول إزعاجه و مزاحمته.

مسألة ١١ ـ انما يصير الموضع شارعاً عاماً بأمور: الأول ـ بكثرة التردد و الاستطراق و مرور القوافل و نحوها في الأرض الموات كالجواد الحاصلة في البراري و القفار التي يسلك فيها من بلاد إلى بلاد، الثاني ـ أن يجعل إنسان ملكه شارعاً وسبّله تسبيلاً دائمياً لسلوك عامة الناس و سلك فيه بعض الناس، فانه يصير بذلك طريقاً عاماً، و لم يكن للمسبل الرجوع بعد ذلك، الثالث ـ أن يحيي جماعة أرضاً مواتاً قرية أو بلدة و يتركوا مسلكاً نافذاً بين الدور و المساكن و يفتحوا إليه الأبواب، و المراد بكونه نافذاً أن يكون له مدخل و مخرج يدخل فيه الناس من جانب ويخرجون من جانب آخر إلى جادة عامة أو إلى أرض

taken his place, he shall not be entitled to remove him from there. If, however, he gets up before fulfilling his purpose intending to come back, then there shall be hesitation in the establishment of his right in it. Of course, it is not permissible for any one to occupy his baggage. Now, if he has gets up even if with the intention of coming back, but wraps up his baggage, then apparently another person shall be entitled to sit in his place, though caution is better.

Problem # 8. There is difficulty in the establishment of the right for a person sitting for carrying out commercial transactions or the like; rather, the case is otherwise. But no one has the right to remove him as long he is there, or occupy his baggage. There is no hindrance in the occupation of the space around his place, even if he in need of that space for placing his merchandise or for standing of those having transaction with him. He is also allowed to sit in a position that may not obstruct his sight of his merchandise or the access of the customers to him, and no person has the right to stop him, but caution is better, and the observation of the interest of a believer is desirable.

Problem # 9. A person who sits for some commercial transaction is allowed to install a canopy for shade on the place of his sitting with a jute or other cloth or similar thing in a way that it may not disturb the passers-by, but he has no right to build a bench or such other thing there.

Problem # 10. If a person sits at part of the public thoroughfare for some commercial transaction one day, and the next day some one else comes earlier than him, and occupies his place, the former shall not be entitled to remove or disturb him.

Problem # 11. Following things are necessary for turning any place into a public thoroughfare:
Firstly, frequency of transit of the people and passage of caravans or the like from a wasteland, or the tracks in forests and desolate lands that are used for public traffic from one place to another.
Secondly, when a person makes a portion of his property for a public thoroughfare and it is used for permanent transit by the general public, and some people use it for transit, thereby the track becomes a public thoroughfare, and the person allowing it for the purpose of public use shall not be entitled to retract.
Thirdly, when a group of persons develop a wasteland into a village or a town, and leave a space between their houses and residential places and open their doors into it, intending thereby to make it a track for the entrance and exit from which the people may enter from one side and exit from the other to the public thoroughfare or a wasteland.
Problem # 12. If the public thoroughfare happens to be between private properties, it has no sanctuary (*Ḥarīm*). If there is a piece of wasteland, suppose, three or four yards wide, and people have been coming and going on it until it becomes a highway, its landlords shall not be compelled to broaden it, even if it becomes a source of inconvenience for the passers-by. Similar shall be the case , if a person leaves a piece of land in the middle of its property or on the side of his property close to the

موات.

مسألة ١٢ ـ لا حريم للشارع العام لو وقع بين الأملاك ، فلو كانت بين الأملاك قطعة أرض موات عرضها ثلاثة أو أربعة أذرع ـ مثلاً ـ واستطرقها الناس حتى صارت جادة لم يجب على الملاك توسيعها و إن تضيقت على المارة و كذا لو سبّل شخص في وسط ملكه أو من طرف ملكه المجاور لملك غيره ثلاثة أو أربعة أذرع مثلاً للشارع، و أما لو كان الشارع محدوداً بالموات بطرفيه أو أحد طرفيه فكان له الحريم، وهو المقدار الذي يوجب إحياؤه نقص الشارع من سبعة أذرع على الأحوط، فلو حدث بسبب الاستطراق شارع في وسط الموات جاز إحياء طرفيه إلى حد يبقى له سبعة أذرع و لا يتجاوز عن هذا الحد، و كذا لو كان لأحد في وسط المباح ملك عرضه أربعة أذرع مثلاً فسبله شارعاً لا يجوز إحياء طرفيه بما لم يبق للطريق سبعة أذرع، ولو كان في أحد طرفي الشارع أرض مملوكة و في الطرف الآخر أرض موات كان الحريم من طرف الموات، بل لو كان طريق بين الموات وسبق شخص و أحيا أحد طرفيه الى حد الطريق اختص الحريم بالطرف الآخر، فلا يجوز للآخر الاحياء إلى حد لا يبقى للطريق سبعة أذرع، فلو بنى بناء مُجاوزاً لذلك الحد ألزم هو بهدمه و تبعيده دون المحيي الأول.

مسألة ١٣ ـ إذا استؤجم الطريق أو انقطعت عنه المارة زال حكمه بل ارتفع موضوعه و عنوانه، فجاز لكل أحد إحياؤه كالموات، من غير فرق في صورة انقطاع المارة بين أن يكون ذلك لعدم وجودهم أو بمنع قاهر إياهم أو لهجرهم إياه واستطراقهم غيره أو بسبب آخر، نعم في المسبل لا يخلو جواز الاحياء من إشكال.

مسألة ١٤ ـ لو زاد عرض الطريق المسلوك عن سبعة أذرع في المسبل لا يجوز لأحد أخذ ما زاد عليها واحياؤه و تملكه قطعاً، و أما غيره ففي جواز إحياء الزائد وعدمه وجهان، أوجههما العدم إلا إذا كان الزائد معرضاً عنه.

مسألة ١٥ ـ و من المشتركات المسجد، و هو من مرافق المسلمين يشترك فيه

neighbouring property belonging to another person, suppose, three or four yards wide for public thoroughfare. If, however, a public road has wasteland on both or one its sides, it shall have a sanctuary, and that is the amount that makes its reclamation obligatory when the public road becomes shorter than seven yards (in breadth), according to the more cautious opinion. If a public road is formed due to public traffic in the middle of wasteland, it is allowed to be broadened until there remains seven yards for it, but it should not exceed this limit. Same shall be the case if there is a piece of land of some one in the middle of public property, suppose, four yards wide, and he leaves it for public thoroughfare, its both sides cannot be developed in a way that may not leave seven yards for public thoroughfare. If there is on one of the two sides of a public road a private land and on the other there is wasteland, its sanctuary shall be on the side of the wasteland. Rather if the public road lies between wasteland, and a person comes first and develops one of its two sides until the limit of the public thoroughfare, the sanctuary shall be exclusively on the other side. So no one shall be allowed to develop it until the limit that there remains no land seven yards wide for the public road. If some one erects a building exceeding that limit, he shall be compelled to demolish it and keep him farther from there unlike the first developer.

Problem # 13. If a public thoroughfare turns into a thicket of reeds or the people. If a public thoroughfare turns into a thicket of reeds or the people cease to pass from it, it ceases to be treated as a public thoroughfare; rather its subject and title is eliminated, and it shall be allowed to be developed by any one like a wasteland, without thee being difference whether the people have ceased to pass from it, or there have been none of them, or a tyrant person has forbidden them to pass from there, or they have given up passing from there and adopted some other route for themselves, or due to some other reason. Of course, it is not far from permissibility for the person initially leaving it to be used as a public thoroughfare to reclaim it, though there is some hesitation in it.

Problem # 14. If the breadth of the thoroughfare used by the public for traffic exceeds seven yards, then if some one has left it to be used as a thoroughfare, no one else shall be entitled to seize the excessive land, develop it and make it his property at all. In case, however, it is not donate by any private person, then with regard to the permissibility or non-permissibility for any other person to develop the excessive land there are two opinions, the opinion more in keeping with the principles of law is in favour of non-permissibility, except when the excessive land has been abandoned.

Problem # 15. Mosque is also among the public properties. It is one of the facilities that is shared equally by the general Muslims, and they are legally allowed to have equal right to utilise it except for what is not suitable and the Legislator has forbidden it, as the stay of a polluted person in it, or the like. So if a person is first to occupy a place in it for prayers, worship, recitation of the Qur'ān or invocation, rather even for teaching, sermonising or issuing religious verdicts, etc., no one is entitled to remove him, irrespective of whether the latter has the same purpose as the former or he has a different purpose

عامتهم، و هم شرع سواء في الانتفاع به إلا بما لا يناسبه و نهى الشارع عنه كمكث الجنب فيه و نحوه، فمن سبق الى مكان منه لصلاة أو عبادة أو قراءة قرآن أو دعاء بل و تدريس أو وعظ أو إفتاء و غيرها ليس لأحد إزعاجه، سواء توافق السابق مع المسبوق في الغرض أو تخالفا فيه، فليس لأحد بأيّ غرض كان مزاحمة من سبق إلى مكان منه باي غرض كان، نعم لا يبعد تقدم الصلاة جماعة أو فرادى على غيرها من الأغراض، فلو كان جلوس السابق لغرضي القراءة أو الدعاء أو التدريس و أراد أحد أن يصلي في ذلك المكان جماعة أو فرادى يجب عليه تخلية المكان له، نعم ينبغي تقييد ذلك بما إذا لم يكن اختيار مريد الصلاة في ذلك المكان لمجرد الاقتراح، بل كان إما لانحصار محل الصلاة فيه أو لغرض راجح ديني كالالتحاق بصفوف الجماعة و نحوه، هذا و لكن أصل المسألة لا تخلو من إشكال فيما إذا كان جلوس السابق لغرض العبادة كالدعاء و القراءة لا لمجرد النزهة و الاستراحة، فلا ينبغي فيه ترك الاحتياط للمسبوق بعدم المزاحمة، و للسابق بتخلية المكان له، والظاهر تسوية الصلاة فرادى مع الصلاة جماعة فلا أولوية للثانية على الأولى، فمن سبق إلى مكان للصلاة منفرداً فليس لمريد الصلاة جماعة إزعاجه لها و إن كان الأولى له تخلية المكان له إذا وجد مكان آخر له، ولا يكون مناعاً للخير عن أخيه.

مسألة ١٦ ـ لو قام الجالس السابق و فارق المكان رافعاً يده منه معرضاً عنه بطل حقه على فرض ثبوت حق له و إن بقي رحله، فلو عاد إليه وقد أخذه غيره ليس له إزعاجه، نعم لا يجوز التصرف في بساطه و رحله، وإن كان ناو ياً للعود، فان كان رحله باقياً بقي حقه لو قلنا بثبوت حق له، و لكن لا يجوز التصرف في رحله على أي حال، وإلا فالظاهر سقوط حقه على فرض ثبوته، لكن ثبوت حق في أمثال ذلك مطلقا لا يخلو من تأمل و إن يظهر منهم التسالم عليه في خصوص المسجد، و الأحوط عدم إشغاله خصوصاً إذا كان خروجه لضرورة كتجديد طهارة أو إزالة نجاسة أو قضاء حاجة و نحوها.

than the former. No one has the right to disturb another who is the first to occupy a place wherever it may be, and whatever his purpose may be. Of course, it is not far from giving preference to the congregational prayer to individual one. So if a person is first to sit in a mosque for recitation of the Qur'ān, invocation, or teaching, and another person intends to offer congregational or individual prayers in that place, the former shall be obliged to vacate the place for the latter. Of course, it should have a proviso that the intention of the latter should not be governed by his personal desire, it should rather be either due to the fact it is the sole place for offering the prayers in it or a preferential religious purpose, as joining the rows of the congregational prayers, or the like.

This may be the case here, but the actual problem is not free from hesitation, as when the purpose of former sitter is worship like invocation or recitation of the Qur'ān and not mere rest and recreation, and so caution must not be given up in this case by the latter by not disturbing the former or by the former by vacating the place for the latter.

Apparently the individual prayer is as good as the congregational prayer, and so the latter does not occupy any preference over the former. So if a person is the first to occupy a place in the mosque to offer individual prayer, another person intending to offer congregational prayer has no right to remove him from there, although it would be better for the former to vacate the place if he can find another place for himself, and he should not be one obstructive his brother in the performance of a virtuous deed.

Problem # 16. If the first sitter has got up and vacated the place without any intention to return, he shall forfeit his right with the supposition that he has any established right, even if his prayer mat is lying there. So if he comes back while another person has taken his place, he shall not be entitled to disturb the latter.

Of course, the latter shall not be allowed to occupy the former's baggage and prayer mat. If he intends to come back and his prayer is lying there, his right shall be intact, if we agree with the establishment of his right, but anyhow no one shall be allowed to occupy his prayer mat, otherwise apparently his right shall drop with the supposition of the establishment of his right.

However, the establishment of an absolute right in such cases is not free from hesitation, though the jurists apparently accede to such right particularly relating to a mosque. According to the more cautious opinion, if a person leaves his place in the mosque particularly for the performance of some urgent business as renewing cleanness, removing pollution or easing nature, or the like, no one shall be entitled to occupy his place.

Problem # 17. Apparently placing the prayer mat as a first act for sitting is like sitting in enjoying preferential right, but it should be like throwing prayer carpet or the like with which one may occupy part of the place required for prayer or most of it, and not like placing a small dust cake [made particularly of the holy soil of Imām Ḥusayn's grave], a rosary, a tooth brush, or the like.

مسألة ١٧ ـ الظاهر أن وضع الرحل مقدمة للجلوس كالجلوس في إفادة الأولوية، لكن إن كان ذلك بمثل فرش سجادة و نحوها مما يشغل مقدار مكان الصلاة أو معظمه لا بمثل وضع تربة أو سبحة أو مسواك و شبهها.

مسألة ١٨ ـ يعتبر أن لا يكون بين وضع الرحل و مجيئه طول زمان بحيث استلزم تعطيل المكان، وإلا لم يفد حقاً، فجازلغيره أخذ المكان قبل مجيئه و رفع رحله و الصلاة مكانه. إذا شغل المحل بحيث لا يمكن الصلاة فيه إلا برفعه، والظاهر أنه يضمنه الرافع إلى أن يوصله إلى صاحبه، و كذا الحال فيما لو فارق المكان معرضاً عنه مع بقاء رحله فيه.

مسألة ١٩ ـ المشاهد كالمساجد في جميع ما ذكر من الأحكام، فان المسلمين فيها شرع سواء، سواء العاكف فيها والباد والمجاور لها و المتحمل اليها من بُعد البلاد، و من سبق إلى مكان منها لزيارة أو صلاة أو دعاء أو قراءة ليس لأحد إزعاجه، وهل للزيارة أولوية على غيرها كالصلاة في المسجد بالنسبة إلى غيرها لو قلنا بأولويتها؟ لا يخلو من وجه، لكنه غير وجيه كأولوية من جاء إليها من البلاد البعيدة بالنسبة الى المجاورين و إن كان ينبغي لهم مراعاتهم، و حكم مفارقة المكان و وضع الرحل و بقائه كما سبق في المساجد.

مسألة ٢٠ ـ و من المشتركات المدارس بالنسبة إلى طالبي العلم أو الطائفة الخاصة منهم إذا خصها الواقف بصنف خاص، كما إذا خصها بصنف العرب أو العجم أو طالب العلوم الشرعية أو خصوص الفقه مثلاً فمن سبق إلى سكنى حجرة منها فهو أحق بها ما لم يفارقها معرضاً عنها و إن طالت مدة السكنى، إلا إذا اشترط الواقف له مدة معينة كثلاث سنين مثلاً، فيلزمه الخروج بعد انقضائها بلا مهلة و إن لم يؤمر به، أو شرط اتصافه بصفة فزالت عنه تلك الصفة، كما إذا شرط كونه مشغولاً بالتحصيل أو التدريس فطرأ عليه العجز لمرض أو هرم و نحو ذلك.

مسألة ٢١ ـ لا يبطل حق الساكن بالخروج لحاجة معتادة كشراء مأكول أو

Problem # 18. It is a condition that there should not a very long time between the placing of the prayer mat and the man's return that may mean leaving the place vacant; otherwise it shall not give him any right. If the prayer mat has occupied the place in a way that it is not possible to offer prayer without removing it, then apparently the person removing it shall be responsible for taking it to its owner. The same shall be the position if a person leaves a place not to return while his prayer mat lies there.

Problem # 19. The holy shrines are to be treated like a mosque in all the rules mentioned. So all the Muslims are legally equal in them, regardless whether they are attached with them, or have come from outside, they may be from among the caretakers of the shrines, or may have from there from distant places. If a person is first to occupy a place in the shrines for pilgrimage, prayer, invocation or recitation [of the Qur'ān], no one else shall be entitled to disturb him. Does pilgrimage occupy preference over other purposes, as prayer in a mosque in relation to any other act, if we give opinion in favour of its preference, it id not free from significance, but this is an without any reasonable ground, as the preference to those who come from far off places in relation to those living nearby, although those living nearby should be considerate towards those coming from distant places. The rules relating to leaving a place, placing prayer mat and its retention are the same as mentioned under the discussion on mosque.

Problem # 20. The schools are also among the public properties as regards their students or a special group of them if their endower has reserved them for a particular group, as when he has reserved them, suppose, for the Arabs, non-Arabs, religious students or particularly for the students of Jurisprudence.

If a person is the fist to occupy any room of it, he shall have better to live in it as long as he does not leave it not to return, even if his stay is long, except when the endower has stipulated a specified time, as, for example, three years. So he shall have to vacate it after the expiry of that period without any delay, even if he is not ordered to do so. Or if the endower has stipulated a quality that has been lost by the occupant, as when the endower has stipulated that the occupants must be engaged in studies or teaching, and the occupant suffers from its loss due to some illness or senility, or the like.

Problem # 21. The occupant does not at all lose his right due to leaving the place for the performance of a usual business, as purchase of foodstuff, or drinks, or clothes, etc., even if he has not left his baggage. It is also not necessary to leave some one in one's place.

Rather he will also not lose his right by going on usual journeys, as travelling for pilgrimage, earning livelihood or treatment with the intention of coming back, leaving his baggage or carpet, provided the time does not become so long as he may not usually be called a resident or one staying in the place, and it may not cause to leave the place vacant for more than usual, and the endower should not have specified any time for the place to be allowed to be left vacant, as when he has stipulated that

مشروب أو كسوة و نحوها قطعاً و ان لم يترك رحله، و لا يلزم تخليف أحد مكانه، بل و لا بالأسفار المتعارفة المعتادة، كالرواح للزيارة أو لتحصيل المعاش أو للمعالجة مع نية العود و بقاء متاعه و رحله ما لم تطل المدة إلى حد لم يصدق معه السكنى و الاقامة عرفاً، و لم يوجب تعطيل المحل زائداً على المتعارف، و لم يشترط الواقف لذلك مدة معينة، كما إذا شرط أن لا يكون خروجه أزيد من شهر أو شهرين مثلاً، فيبطل حقه لو تعدى زمن خروجه عن تلك المدة.

مسألة ٢٢ ـ من أقام في حجرة منها ممن يستحق السكنى بها له أن يمنع من أن يشاركه غيره اذا كان المسكن معداً لواحد إما بحسب قابلية المحل أو بسبب شرط الواقف، ولو أعد لما فوقه لم يكن له منع غيره إلا اذا بلغ العدد الذي أعد له، فللسكنة منع الزائد.

مسألة ٢٣ ـ يلحق بالمدارس الرباطات، و هي المواضع المبنية لسكنى الفقراء، و الملحوظ فيها غالباً للغرباء، فمن سبق منهم الى اقامة بيت منها كان أحق به، وليس لأحد إزعاجه، و الكلام في مقدار حقه و ما به يبطل حقه و جواز منع الشريك و عدمه فيها كما سبق في المدارس.

مسألة ٢٤ ـ و من المشتركات المياه، و المراد بها مياه الشطوط و الأنهار الكبار كدجلة، و الفرات و النيل أو الصغار التي لم يجرها أحد، بل جرت بنفسها من العيون أو السيول أو ذوبان الثلوج، و كذلك العيون المنفجرة من الجبال أو في أراضي الموات، والمياه المجتمعة في الوهاد من نزول الأمطار، فان الناس في جميع ذلك شرع سواء، و من حاز منها شيئاً بآنية أو مصنع أو حوض و نحوها ملكه، و جرى عليه أحكام الملك من غير فرق بين المسلم و الكافر، و أما مياه العيون و الآبار و القنوات التي حفرها أحد في ملكه أو في الموات بقصد تملك مائها فهي ملك للحافر كسائر الأملاك ، لا يجوز لأحد أخذها والتصرف فيها إلا باذن المالك عدا بعض التصرفات التي مر بيانها في كتاب الطهارة، و ينتقل الى غيره بالنواقل المشرعية قهرية كانت كالارث أو اختيارية كالبيع والصلح و الهبة و غيرها.

the occupant's absence should not be, suppose, for more than a month or two, so that if the time of his absence exceeds that period, he shall lose his right.

Problem # 22. If a person stays in a room of the school and is entitled to live in it, he shall be entitled to forbid another to share with him if the room is prepared for a single person, either due to the capacity of the room or due to the condition made by the endower.
If, however, it is made for more than one person, he shall not be entitled to forbid, except when the number for which it has been made is already full, in which case those living in the room shall be entitled to forbid others in excess of the required number.

Problem # 23. To the schools are affiliated caravansarais. They are the places built for the residence of the poor, and special consideration there is made for those coming from outside. So whosoever comes first to live in any of its rooms shall have a preferential right, and no one shall be entitled to disturb him. As regards the rules relating the extent of his right and what terminates his right, the permissibility of sharing with another or the absence of it, they are the same mentioned under the discussion on schools.

Problem # 24. The sources of water are also among the public properties. By them are meant the water of big rivers and canals like the Tigris, Euphrates, the Nile, or the small canals not made by any private person, but those that have been formed by themselves through the flow of water from springs or floods, or melting of snow.

Similar is the case with the springs that gush out from the mountains or in the wastelands, or the rain water that gathers in low lands. The people equally share them.
If any person fills some of the water into a vessel, machine, reservoir, or he like, it shall be his property, and it shall be governed by the rules of private ownership, without there being any difference between a Muslim and infidel.

As regards the water of a spring, wells, subterranean canals dug by any one in his property or in a wasteland with the intention of having ownership rights on it, it shall be the property of the digger like all other properties, and no one shall be entitled to have it or make any changes in it except with the permission of its owner, except some of the uses mentioned under the Section on Cleanness. It is also transferred to another by means of mandatory legal transfers like inheritance, or deliberate ones as sale, conveyance, gift, etc.

Problem # 25. If a person breaks up a canal from public source of water as a big river, or the like, he shall be the owner of the water that flows into the canal, and it shall be governed by the rules relating to property as water stored in a vessel or the like, and the ownership of the water shall follow the ownership of the canal. If the canal belongs to a single person, he shall be the owner of the entire water. If, however, it belongs to a group of persons, it shall belong to each of them in proportion to the

مسألة ٢٥ - إذا شق نهراً من ماء مباح كالشط و نحوه ملك ما يدخل فيه من الماء و يجري عليه أحكام الملك كالماء المحوز في آنية و نحوها، وتتبع ملكية الماء ملكية النهر، فان كان النهر لواحد ملك الماء بالتمام، و إن كان لجماعة ملك كل منهم من الماء بمقدار حصته من ذلك النهر، فان كان لواحد نصفه و لآخر ثلثه و لثالث سدسه ملكوا الماء بتلك النسبة و هكذا، و لا يتبع مقدار استحقاق الماء مقدار الأراضي التي تسق منه، فلو كان النهر مشتركاً بين ثلاثة أشخاص بالتساوي كان لكل منهم ثلث الماء، و إن كانت الأراضي التي تسق منه لأحدهم ألف جريب و لآخر جريباً و لآخر نصف جريب فيصرفان مازاد على احتياج أرضهما فيما شاءا، بل لو كان لأحدهما رحى يدور به ولم يكن له أرض أصلاً يساوي مع كل من شريكيه في استحقاق الماء.

مسألة ٢٦ - انما يملك النهر المتصل بالمباح بحفره في الموات بقصد إحيائه نهراً مع نية تملكه إلى أن يوصله بالمباح كما مر في إحياء الموات، فان كان الحافر واحداً ملكه بالتمام، و إن كان جماعة كان بينهم على قدر ما عملوا، فمع التساوي بالتساوي، و مع التفاوت بالتفاوت.

مسألة ٢٧ - لمّا كان الماء الذي يفيضه النهر المشترك بين جماعة مشتركاً بينهم كان حكمه حكم سائر الأموال المشتركة، فلا يجوز لكل واحد منهم التصرف فيه، و أخذه والسقاية به إلا باذن باقي الشركاء، فان لم يكن بينهم تعاسر و يبيح كل منهم سائر شركائه أن يقضي منه حاجته في كل وقت و زمان فلا بحث، وإن وقع بينهم تعاسر فان تراضوا بالتناوب و المهاياة بحسب الساعات أو الأيام أو الأسابيع مثلاً فهو، و إلا فلا محيص من تقسيمه بينهم بالأجزاء بأن توضع على فم النهر خشبة أو صخرة أو حديدة ذات ثقب متساوية السعة حتى يتساوى الماء الجاري فيها، و يجعل لكل منهم من الثقب بمقدار حصته، و يجري كل منهم ما يجري في الثقبة المختصة به في ساقية تختص به، فاذا كان بين ثلاثة و سهامهم متساوية فان كانت الثقب ثلاثاً متساوية جعلت لكل منهم ثقبة، و إن كانت ستاً جعلت

amount of his share in that canal. If half of it belongs to one, a third to the second and a sixth to the third, they shall share in the ownership of the water in the same proportion, and so on. But the amount of entitlement to the water shall not follow the amount of the land irrigated by it. So if the canal is jointly owned by three persons equally, a third of the water shall belong to each of them, and if the area of the land of one of them irrigated by water is a thousand *Jarībs* (Iranian acres), of another one *Jarīb* and of the third a half *Jarīb*, they shall be entitled to spend the water in excess of the demand of their land anywhere they like. Rather if one of them owns a quern run by water, but has no land at all, he shall also equally share the water with other two partners.

Problem # 26. A person owns a canal liked with the public source of water by digging it in a wasteland with the intention of developing it for making it a canal and also intending to own it till he links it with the public source of water, as mentioned under the Section on the Reclamation of Wastelands. So if the digger is a single person, he shall own it entirely. If, however, it is owned by a group, it shall belong to them according to the amount of labour put in, so that if the amount of labour put in was equal, they shall share it equally, and if the amount of labour was different, they shall share it differently.

Problem # 27. As the water that is supplied by a canal jointly owned by a group is also jointly owned by them, its rules shall also be like all jointly owned properties. So none of them shall be entitled to make any use of it, or take it and irrigate (his land) with it, except with the permission of the other partners.

If there is no dispute among them, and each of them approves other partners to fulfil his demand from it at any time and for any period, well and good.

If, however, there is some dispute among them, then if they have agreed with the supply of water by turn and joint use, suppose, according to hours, days or weeks, it will be done accordingly; otherwise, there shall be no alternative but to divide the water among them in parts by putting a wood, stone or iron having holes of equal breadth so that the amount of water flowing from it could be equal, and each of them should be provided the number of holes in proportion to his respective share, and let each of them irrigate his land by the water supplied from the holes exclusively meant for him.

If it is owned by three persons, and their share is equal, then if there are three equal holes, one hole shall be reserved for each of them. If the holes are six, to each of them shall belong two holes.

If they own different shares, the holes shall be made in the number of the smallest one. So if one of them owns half of the shares, another a third and the third one a sixth, six holes shall be made, so that three of them shall go to the one having half of the shares, two to the one having a third and one to the one having a sixth, and the same system shall be followed in other cases. Once the share of each of them is separated, each of them shall be entitled to use the water of his share in whatever way

لكل منهم ثقبتان، و إن كانت سهامهم متفاوتة تجعل الثقب على أقلهم سهماً، فاذا كان لأحدهم نصفه و لآخر ثلثه و لثالث سدسه جعلت الثقب ستاً، ثلاث منها لذي النصف، وإثنتان لذي الثلث و واحدة لذي السدس و هكذا، و بعد ما أفرزت حصة كل منهم من الماء يصنع بمائه ما شاء.

مسألة ٢٨ ـ الظاهر أن القسمة بحسب الأجزاء قسمة إجبار، فاذا طلبها أحد الشركاء يجبر الممتنع منهم عليها، و هي لازمة ليس لأحدهم الرجوع عنها بعد وقوعها، و أما المهاياة فهي موقوفة على التراضي و ليست بلازمة، فلبعضهم الرجوع عنها حتى فيما إذا استوفى تمام نوبته ولم يستوف الآخر نوبته و إن ضمن حينئذ مقدار ما استوفاه بالمثل مع إمكانه، و إلا فبالقيمة.

مسألة ٢٩ ـ إذا اجتمعت أملاك على ماء مباح من عين أو واد أو نهر و نحوها بأن أحياها أشخاص عليه ليسقوها منه بواسطة السواقي أو الدوالي أو النواعير أو المكائن المتداولة في هذه الأعصار كان للجميع حق السقي منه، فليس لأحد أن يشق نهراً فوقها يقبض الماء كله أو ينقصه عن مقدار احتياج تلك الأملاك ، و حينئذ فإن و فى الماء لسقي الجميع من دون مزاحمة في البين فهو، و إن لم يف ووقع بين أربابها في التقدم و التأخر التشاح و التعاسر يقدم الأسبق فالأسبق في الاحياء إن علم السابق، و إلا يقدم الأعلى فالأعلى و الأقرب فالأقرب إلى فوهة الماء و أصله، فيقضي الأعلى حاجته ثم يرسله إلى ما يليه و هكذا. لكن لا يزيد للنخل عن الكعب أي قبة القدم على الأحوط و إن كان الجواز إلى أول الساق لا يخلو من قوة، و للشجر عن القدم، و للزرع عن الشراك .

مسألة ٣٠ ـ الأنهار المملوكة المنشقة من الشطوط و نحوها إذا وقع التعاسر بين أربابها بأن كان الشط لا يفي في زمان واحد باملاء جميع تلك الأنهار كان حالها كحال اجتماع الأملاك على الماء المباح المتقدم في المسألة السابقة، فالأحق ما كان شقه أسبق ثم الأسبق، و إن لم يعلم الأسبق فالمدار هو الأعلى فالأعلى، فيقبض الأعلى ما يسعه ثم مايليه و هكذا.

he likes.

Problem # 28. Apparently the division according to the parts is a forcible division. If one of the partners demands it, the other refraining partners are compelled to accept it, and it is binding as no one is allowed to withdraw once it has taken effect. The system of joint utilisation, however, depends on the mutual agreement, and is not binding. So any one may withdraw from it, even in case he has accomplished his turn, and the other one has not done it, though he shall be liable for accomplishing a similar amount, if possible, otherwise by paying its cost.

Problem # 29. If some privately owned lands have assembled around a public source of water like a spring, river or canal or the like when some people have developed them in order to irrigate them by means of scoops, leather buckets, Persian wheel or the machines currently used in modern times, all of them shall be entitled to irrigate through them. No one shall have the right to dig a canal above it and occupy the whole of water or reduce the amount of water required for those lands. If in this case the water is sufficient to irrigate all those lands without any inconvenience, it would be all right.

If, however, it is not sufficient and some dispute and quarrel take place among their owners regarding the right of precedence, those who have been prior to develop the lands shall be given preferential right, provided there is knowledge about the prior developer; otherwise, those occupying higher position, or those being closer to the source of water shall be given precedence. So first the one occupying a higher position shall fulfil his requirement, and then the following one, and so on. According to the more cautious opinion, the amount of water for saplings should not exceed the extent of ankle or "the dome of the foot", though the permissibility up to the first part of the shin is not free from force, and for a tree it is up to a foot and for the farm it is the shoe-lace.

Problem # 30. In case of the privately owned canals that have been taken out from big rivers or the like, if a dispute arises among their owners relating to the problem that the river is not sufficient to fill at the same time all those canals, its case shall be similar to the convergence of the private lands around the public source of water mentioned in the preceding Problem, so that the owner of the canal who has dug it first shall have precedence over others, and then the one who follows him. If it is not known as to who did it prior to others, then the matter shall be decided according to the one who occupies the higher position, to be followed by the one coming after him. So the one having the highest position shall fulfil his requirement first, and then the one who follows him, and so on.

Problem # 31. If a canal jointly owned by a group requires dredging, digging, repair or closing of a fissure, or the like, then if all of them take action on it, the cost of the operation shall be shared by all of them in proportion to their respective shares in the canal, regardless whether their action has been voluntary or forcible by the order of a tyrant ruler or by the legal obligation, as when it is jointly owned by those under guardianship, and the guardian finds, suppose, its repair in the utmost interest of them.

مسألة ٣١ ـ لو احتاج النهر المملوك المشترك بين جماعة إلى تنقية أو حفر أو إصلاح أو سد خرق و نحو ذلك فان أقدم الجميع على ذلك كانت المؤونة على الجميع بنسبة ملكهم للنهر، سواء كان إقدامهم بالاختيار أو بالاجبار من حاكم قاهر جائر أو بالزام من الشرع، كما اذا كان مشتركاً بين المولى عليهم و رأى الولي المصلحة الملزمة في تعميره مثلاً، و ان لم يقدم إلا البعض لم يجبر الممتنع، و ليس للمقدمين مطالبته بحصته من المؤونة ما لم يكن إقدامهم بالتماس منه و تعهده ببذل حصته، نعم لو كان النهر مشتركاً بين القاصر وغيره وكان إقدام غير القاصر متوقفاً على مشاركة القاصر إما لعدم اقتداره بدونه أو لغير ذلك وجب على ولي القاصر مراعاة لمصلحته تشريكه في التعمير و بذل المؤونة من ماله بمقدار حصته.

مسألة ٣٢ ـ و من المشتركات المعادن، و هي إما ظاهرة، وهي ما لا تحتاج في استخراجها و الوصول اليها إلى عمل و مؤونة كالملح و القير و الكبريت، و الموميا والكحل و النفط إذا لم يحتج كل منها إلى الحفر و العمل المعتد به، و اما باطنة، و هي ما لا تظهر إلا بالعمل و العلاج كالذهب و الفضة، و النحاس و الرصاص و كذا النفط اذا احتاج في استخراجه الى حفر آبار كما هو المعمول غالباً في هذه الأعصار، فأما الظاهرة فهي تملك بالحيازة لا بالاحياء، فن أخذ منها شيئاً ملك ما أخذه قليلاً كان أو كثيراً و ان كان زائداً على ما يعتاد لمثله و على مقـدار حاجته، و يبقى الباقي مما لم يأخذه على الاشتراك و لا يختص بالسابق في الأخذ، و ليس له على الأحوط أن يحوز مقداراً يوجب الضيق والمضارة على الناس، و أما الباطنة فهي تملك بالاحياء بأن ينهي العمل و النقب و الحفر إلى أن يبلغ نيلها، فيكون حالها حال الآبار المحفورة في الموات لأجل استنباط الماء، و قد مرّ أنها تملك بحفرها حتى يبلغ الماء و يملك بتبعها الماء، ولو عمل فيها عملا لم يبلغ به نيلها كان تحجيراً أفاد الأحقيـة و الأولوية دون الملكية.

مسألة ٣٣ ـ إذا شرع في إحياء معدن ثم أهمله و عطله أجبر على إتمام العمل

If, however, some of them take action, those who refrain cannot be compelled, and those taking action cannot demand the payment of the cost of the operation from them, unless their action was on their demand and their undertaking to pay their share in the cost. Of course, if the canal was jointly owned by minors, etc., and the action of those not being minors depends on the participation of the minors, either due to inability to do it without their participation, etc., it is shall be obligatory on the guardian of the minors to observe the interest of participation of the minors in the operation and contribute to the cost of the operation from the minors' property up to their respective shares.

Problem # 32. The mines are also among the public properties. They are either open, that do not require any labour or trouble for their exploitation and reaching their source, like mines of salt, tar, sulphur, mineral wax, antimony, or petroleum, as none of them requires drilling or considerable labour. Or they are hidden, that do not come out except by labour and treatment, as gold, silver, copper or lead and so is petroleum when it requires drilling of well for exploitation as is mostly usual in these days.

As regards the open mines, they become the property by occupation and not by reclamation. Whosoever takes anything from it, becomes the owner of what he takes, whether in small quantity or in large quantity, even if it is more than is usual but it is according to his need, But what is left in the mine that has not been taken by him shall be the common property of all and is not reserved for the person who first took something from it, and he is not entitled to hold so much as may cause discomfort and disadvantage to other people.

As regards the hidden mines, they become the property by reclamation, so that the person should dig, excavate and drill so much that he may reach it. Its case is similar to that of the wells dug in wastelands for finding water. It has already been mentioned that they become the property of the digger by digging until they reach the level of water, and in pursuance also becomes the owner of the water.

If a person puts in labour but does not succeed in reaching water, it shall be reserved for him, and he shall enjoy preferential right and precedence short of ownership.

Problem # 33. If a person starts the reclamation of a mine and then forsakes and abandons it, he shall be forced to accomplish it or wash off hands from it.

If he forwards some excuse, he shall be granted more time to the extent that the excuse could be over. Thereafter, he shall be forced to do either of the two alternatives as mentioned fully under the reclamation of wastelands.

Problem # 34. If a person develops a land for farming or building a house, and thee appears a mine in

أو رفع يده عنه، ولو أبدى عذراً أنظر بمقدار زوال عذره ثم ألزم على أحد الأمرين كماسبق ذلك كله في إحياء الموات.

مسألة ٣٤ ـ لو أحيا أرضاً مزرعاً أو مسكناً مثلا فظهر فيها معدن ملكه تبعاً لها، سواء كان عالماً به حين إحيائها أم لا.

مسألة ٣٥ ـ لو قال رب المعدن لآخر: «اعمل فيه و لك نصف الخارج» مثلا بطل ان كان بعنوان الاجارة، و صح لو كان بعنوان الجعالة.

it, it shall be his property in pursuance of the ownership of the land, regardless whether at the time of its reclamation he had knowledge about it or not.

Problem # 35. If the land-owner says to another to put in labour in it and, suppose, half of the output would go to him, it shall be void, if it was in the form of a lease, but it shall be valid if it was in the form of a *Ju'ālah*.

كتاب اللقطة

وهي بمعناها الاعم كل مال ضائع عن مالكه و لم يكن يد عليه، وهي إما حيوان أو غير حيوان.

القول في لقطة الحيوان

وهي المسماة بالضالة:

مسألة ١ - اذا وجد الحيوان في العمران لا يجوز أخذه و وضع اليد عليه أيّ حيوان كان، فمن أخذه ضمنه ويجب عليه حفظه من التلف و الانفاق عليه بما يلزم، و ليس له الرجوع على صاحبه بما أنفق، نعم ان كان شاة حبسها ثلاثة أيام فان لم يأت صاحبها باعها و تصدق بثمنها، و الظاهر ضمانها لو جاء صاحبها و لم يرض بالتصدق، و لا يبعد جواز حفظها لصاحبها أو دفعها الى الحاكم أيضاً، ولو كان الحيوان في معرض الخطر لمرض أو غيره جاز له أخذه من دون ضمان، ويجب عليه الانفاق عليه، وجاز له الرجوع بما أنفقه على مالكه لو كان إنفاقه عليه بقصد الرجوع عليه، و ان كان له منفعة من ركوب أو حمل عليه أو لبن و

SECTION THIRTY-SEVEN

AN ARTICLE OR THING LOST AND FOUND (*LUQAṬAH*)

In its general sense, *Luqatah* means every thing or article that is lost by its master, and it may not be in possession of anyone.

It is either an animal, or other than an animal.

Chapter One - *Luqaṭah* of an Animal

A *Luqaṭah* of an animal is also called a Ḍāllah, or something lost.

Problem # 1. If an animal is found in a populated area, it is not lawful to take hold of it and bring it under one's possession, whatever kind of animal it may be.

So if a person seizes it, shall be responsible for it, and he shall be bound to protect it from loss and to spend on it what is necessary, and he shall not have recourse to its owner for what he spends on it.

Of course, if it is a goat or sheep, he shall confine it for three days. If its owner is not found, he shall dispose it off and give its sale-proceeds in charity.

Apparently he shall be responsible for it, when its owner turns up and does not agree with giving it in charity. It is also not far from being permissible to keep it safely on behalf of its master or hand it over to the judge too.

If the animal is in danger due to illness, etc., one shall be allowed to seize it without any responsibility, but he shall be bound to spend on it, and it shall be lawful for him to have recourse to its master for what he has spent, if he has spent on it with the intention of having recourse to its owner.

If the animal has some usufruct like riding, loading, milk, or the like, the person seizing it may

نحوه جاز له استيفاؤها و احتسابها بازاء ما أنفق، و يرجع الى صاحبه ان كانت النفقة أكثر، و يؤدي اليه الزيادة ان زادت المنفعة عنها.

مسألة ٢ ـ بعد ما أخذ الحيوان في العمران و صار تحت يده يجب عليه الفحص عن صاحبه في صورتي جواز الأخذ و عدمه، فاذا يئس من صاحبه تصدق به أو بثمنه كغيره من مجهول المالك .

مسألة ٣ ـ ما يدخل في دار الانسان من الحيوان كالدجاج و الحمام مما لم يعرف صاحبه الظاهر خروجه عن عنوان اللقطة، بل هو داخل في عنوان مجهول المالك، فيتفحص عن صاحبه و عند اليأس منه يتصدق به، والفحص اللازم هو المتعارف في أمثال ذلك بأن يسأل من الجيران والقريبة من الدور و العمران، و يجوز تملك مثل الحمام اذا ملك جناحيه و لم يعلم أن له صاحباً و لا يجب الفحص، و الأحوط فيما اذا علم أن له مالكاً ولو من جهة آثار اليد أن يعامل معه معاملة مجهول المالك.

مسألة ٤ ـ ما يوجد من الحيوان في غير العمران من الطرق و الشوارع و المفاوز و الصحاري و البراري و الجبال و الآجام و نحوها ان كان مما يحفظ نفسه بحسب العادة من صغار السباع مثل الثعالب و ابن آوى و الذئب و الضبع و نحوها ـ إما لكبر جثته كالبعير أو لسرعة عدوه كالفرس و الغزال أو لقوته و بطشه كالجاموس و الثور ـ لا يجوز أخذه و وضع اليد عليه اذا كان في كلأ و ماء، أو كان صحيحاً يقدر على تحصيل الماء و الكلأ، و ان كان مما تغلب عليه صغار السباع كالشاة و أطفال البعير والدواب جاز أخذه، فاذا أخذه عرّفه على الأحوط في المكان الذي أصابه و حواليه ان كان فيه أحد، فان عرف صاحبه رده اليه، و الا كان له تملكه و بيعه و أكله مع الضمان لمالكه لو وجد، كما أن له إبقاءه و حفظه لمالكه، و لا ضمان عليه.

مسألة ٥ ـ لو أخذ البعير و نحوه في صورة لا يجوز له أخذه ضمنه، ويجب عليه الانفاق عليه، و ليس له الرجوع بما أنفقه على صاحبه و ان كان من قصده

lawfully bring it into use and set it off against what he has spent on it, and in case the amount spent is more than its usufruct, he may have recourse to its master, and pay it to him if it were in excess.

Problem # 2. After a person seizes an animal in a populous area and keeps it in his possession, he shall be bound to make a search for its master, in both cases, whether he was legally allowed to get hold of it or not. If he despairs of finding the owner, he may either give itself or its sale-proceeds in charity, as any other animal whose master is not known.

Problem # 3. If an animal enters the house of a person like a fowl or pigeon whose master is not known, it shall not fall under the category of *Luqaṭah*, but it would relate to the category of thing whose master is not known.

So the person shall make a search for its master, and in the event of despair of find him, give it in charity. The required search in such cases is usual that he must enquire about it from the neighbours and those having their houses or population nearby. If the pigeon is able to fly with its wings, and it is not known that it has a master, it may be kept as one's property, and the search for its master is not obligatory.

If it is known that it has some master, even if it appears from the signs of ownership, it is more cautious to treat it as a thing whose master is not known.

Problem # 4. If an animal is found in areas other than the populous ones like the public highways, thoroughfares, jungles, deserts, steppes, mountains , reed thickets, etc, if it is one that by nature can protect itself from small beasts like foxes ,jackals, wolves, and hyena, etc. either due to its large size as a camel, or speed of its race like a horse, deer , or its force and attacking power as a buffalo or bulls, it cannot lawfully be seized and brought into possession if it is found in a meadow or a place having water, or it is quite healthy and is able to get water and fodder for itself.

If, however, it is of the kind that can be overpowered by small beasts like a goat or sheep, young of a camel or other quadrupeds, it shall be lawful to seize it.

Once a man seizes it, he must, to be more cautious, inform the people of the area and around it from where he has caught it if there happens to be any one living. If he comes to know of its master, he shall return it to him; otherwise, he shall be entitled to keep it in his possession and sell it or eat it with the responsibility towards its master if and when found, as also he may retain it and keep it safely on behalf of its master, without any responsibility (for its loss).

Problem # 5. If a person catches a camel, etc. in a way that it is not lawful to do, he shall be responsible, an he shall be bound to spent on it, without being entitled to have resort to its master for what he spends on it, even if he intended to have resort to its master, as has already been mentioned in case he seizes the animal in a populous area..

Problem # 6. If a master leaves an animal and abandons it in the public highways, deserts and steppes, if it is with the intention of giving it, every one is allowed to seize it and bring it into his property,

الرجوع عليه كما مر فيما يؤخذ من العمران.

مسألة ٦ ـ اذا ترك الحيوان صاحبه و سرّحه في الطرق أو الصحاري و البراري فان كان بقصد الاعراض عنه جاز لكل أحد أخذه و تملكه، كما هو الحال في كل مال أعرض عنه صاحبه، و ان لم يكن بقصد الاعراض بل كان من جهة العجز عن إنفاقه أو من جهة جهد الحيوان و كلاله كما يتفق كثيراً أن الانسان اذا كلت دابته في الطرق و المفاوز و لم يتمكن من الوقوف عندها يأخذ رحلها أو سرجها و يسرحها و يذهب، فان تركه في كلأ و ماء و أمن ليس لأحد أن يأخذه، فلو أخذه كان غاصباً ضامناً له، و إن أرسله بعد ما أخذه لم يخرج من الضمان، وفي وجوب حفظه و الانفاق عليه و عدم الرجوع على صاحبه ما مرّ فيما يؤخذ في العمران، و إن تركه في خوف و على غير ماء وكلأ جاز أخذه، و هو للآخذ اذا تملكه.

مسألة ٧ ـ إذا أصاب دابة و علم بالقرائن أن صاحبها قد تركها ولم يدر أنه قد تركها بقصد الاعراض أو بسبب آخر كانت بحكم الثاني، فليس له أخذها و تملكها إلا اذا كانت في مكان خوف بلا ماء ولا كلأ.

مسألة ٨ ـ اذا أصاب حيواناً في غير العمران و لم يدر أن صاحبه قد تركه بأحد النحوين أو لم يتركه بل ضاعه أوشرد عنه كان بحكم الثاني من التفصيل المتقدم، فان كان مثل البعير لم يجز أخذه و تملكه إلا اذا كان غير صحيح و لم يكن في ماء و كلأ، و ان كان مثل الشاة جاز أخذه مطلقا.

القول في لقطة غير الحيوان

وهي التي يطلق عليها اللقطة عند الاطلاق و اللقطة بالمعنى الأخص، و يعتبر فيها عدم معرفة المالك، فهي قسم من مجهول المالك، لها أحكام خاصة.

مسألة ١ ـ يعتبر فيها الضياع عن المالك، فما يؤخذ من يد الغاصب و السارق

as is the case every thing that is abandoned by its master.

If, however, it is without the intention of abandoning it, but was rather due to his inability to support it, or due to the old age of the animal and its exhaustion, as it happens in many cases when if an animal falls down in a public highway or a jungle and its master is not able to let it stand again, in such case, he takes his rein and saddle and leaves it there and goes away.

If its master leaves it in a meadow or a place having water, no one can lawfully seize it, and if any one seizes it, he shall be a usurper and held responsible for it. If he frees it after once having seized, he shall not cease to be responsible. As regards his obligation for its protection and spending on it, without having recourse to its master, the rule shall be as has been mentioned in case a person seizes an animal in a populous area.

If the master of the animal leaves it out of fear or in a place where there is no fodder or water, it shall be lawful to seize it, and it shall be the property of the person who seizes it.

Problem # 7. If a person finds an animal, and know by circumstances that its master has left it, but does not know whether he has left for abandoning it or any other reason, it shall be considered not to have abandoned it, and so he shall not be allowed to seize it and make it his property, except when it was in a place a place of danger without any water or fodder.

Problem # 8. If person finds an animal in an unpopulated area, and does not know whether its master has left it for one of the two reasons, or he has not left it, but it has been lost or has escaped from him, he shall be governed by the second case mentioned in the preceding Problem.

So if it is an animal like a camel, it shall not be lawful to seize it, except when it is neither healthy, nor is it found in a place having water and fodder.

If it was an animal like a goat or sheep, it shall be absolutely lawful to seize it.

Chapter Two - *Luqaṭah* of a Thing other than an Animal

This is what is generally known a *Luqaṭah*, and is known as *Luqaṭah* in a special sense. It is a condition in it that its master must not be known. So it is a kind of an article whose owner is not known. It has some special rules.

Problem # 1. It is a condition in *Luqaṭah* that it must be lost by its master. So whatever is taken from a usurper or a thief is not called a *Luqaṭah*, due to the fact that it is not lost by its master.

It is indispensable for the application of the rules of *Luqaṭah* that it should have been lost, even it is proved by circumstantial evidence. If his shoes are changed with some other shoes in a mosque, or the like, there shall be hesitation in applying the rules of *Luqaṭah* to it. Similar is the case of the clothes changed with other clothes in a public *Ḥammām* or the like due to the likelihood of a

ليس من اللقطة لعدم الضياع عن مالكه، بل لابدّ في ترتيب أحكامها من إحراز الضياع ولو بشاهد الحال، فالمداس المتبدل بمداسه في المساجد و نحوها يشكل ترتيب أحكام اللقطة عليه، و كذا الثوب المتبدل بثوبه في الحمام ونحوه، لاحتمال تعمد المالك في التبديل، و معه يكون من مجهول المالك لا من اللقطة.

مسألة ٢ ـ يعتبر في صدق اللقطة و ثبوت أحكامها الأخذ و الالتقاط فلو رأى غيره شيئاً و أخبر به فأخذه كان حكمها على الآخذ دون الرائي و إن تسبب منه. بل لو قال ناولنيه فنوى المأمور الأخذ لنفسه كان هو الملتقط دون الآمر، ولو أخذه لا لنفسه و ناوله إياه ففي كون الآمر ملتقطاً إشكال فضلاً عن أخذه بأمره و نيابته من دون أن يناوله إياه.

مسألة ٣ ـ لو رأى شيئاً مطروحاً على الأرض فأخذه بظن أنه ماله فتبين أنه ضائع عن غيره صار بذلك لقطة و عليه حكمها، و كذا لو رأى مالاً ضائعاً فنحاه بعد أخذه من جانب إلى آخر، نعم لو دفعه برجله أو بيده من غير أخذ ليتعرفه فالظاهر عدم صيرورته بذلك ملتقطاً، بل و لا ضامناً لعدم صدق اليد والأخذ.

مسألة ٤ ـ المال المجهول المالك غير الضائع لا يجوز أخذه ووضع اليد عليه، فان أخذه كان غاصباً ضامناً إلا إذا كان في معرض التلف فيجوز بقصد الحفظ، و يكون حينئذ في يده أمانة شرعية، ولا يضمن إلا بالتعدي أو التفريط، و على كل من تقديري جواز الأخذ و عدمه لو أخذه يجب عليه الفحص عن مالكه إلى أن ييئس من الظفر به، وعند ذلك يجب عليه أن يتصدق به أو بثمنه، ولو كان مما يعرض عليه الفساد و لا يبقى بنفسه يبيعه أو يقوّمه و يصرفه، و الأحوط أن يكون البيع باذن الحاكم مع الامكان، ثم بعد اليأس عن الظفر بصاحبه يتصدق بالثمن.

مسألة ٥ ـ كل مال غير الحيوان أحرز ضياعه عن مالكه المجهول ولو بشاهد الحال ـ و هو الذي يطلق عليه اللقطة كما مرّ ـ يجوز أخذه و التقاطه على كراهة، و

deliberate intention of their master in such change. So they are to be treated as a thing whose owner is not known, and not a *Luqaṭah*.

Problem # 2. It is a condition for a thing to be treated as *Luqaṭah* and the application of its rules that it should have been seized after it was lost. So if a person notices a thing and informs another about it, and he picks it up, its rules shall apply to the person who has picked it up and not the one first saw it, though he has been instrumental in picking it up. Rather if a person orders another to bring the thing to him, and the person ordered intends to seize it for himself, he shall be treated as the person who has seized the *Luqaṭah* and not the one who had ordered him. If, the person has lifted the thing not for himself but has brought it to the person ordering him, then thee shall be hesitation in treating the person ordering to be the one seizing the *Luqaṭah* not to speak of picking the thing by his order on his behalf but without giving it to him.

Problem # 3. If a person finds a thing lying on the ground, and he takes it under the impression that it is his property, but later it transpires that it has been lost by some one else, it shall thereby become a *Luqaṭah* and its rules shall apply to him. The same shall be the case if one sees a lost thing, and changes its position after having picked it up from one place o another. Of course, if he pushes a thing with his foot or hand without picking it up, then apparently he shall not be treated as one seizing a *Luqaṭah*. Rather he shall not be held responsible due to the fact that he has neither possessed it nor has picked it up.

Problem # 4. It is not lawful either to seize a thing whose owner is not known or possess it. If a person seizes it, he shall be treated a usurper and responsible (for its loss), except when there is a risk of its being perished, it is allowed to seize it for protection, in which case it lies in the possession of the person seizing it to keep it as a trust, but he is not responsible except in case of his deliberate negligence or overstepping his authority. In either case of his having permission to seize it, he shall be bound to make a search for its master until he despairs of succeeding to find him. In that case he is bound to give its or its price in charity. If it is something that may suffer decay and does not remain intact, he may dispose it off, or evaluate it and use it himself. According to the more cautious opinion, its sale must be with the permission of the judge, if possible. After having despaired of success in finding its master, its price may be given in charity.

Problem # 5. Everything other than an animal whose master it not known, if it is proved that it has been lost by its master, even if through circumstantial evidence, that is called a *Luqaṭah* as mentioned before, is allowed to be seized and treat it as a *Luqaṭah* with reluctance. If it was lost in the *Ḥaram* or *Ḥaram* of Mecca , May Allāh increase its honour and regard, its reluctance becomes sronger to seize it as a *Luqaṭah*, rather its caution must not be given up by leaving it (where it is found lying).

Problem # 6. It is allowed to make a *Luqaṭah* one's property immediately after it is found without there being any obligation for making its announcement and search for its master, if its price is less than a Dirham. According to the stronger opinion, however, one does becomes its owner automatically without the intention to own it.

إن كان المال الضائع في الحرم أي حرم مكة زادها الله شرفاً و تعظيماً اشتدت كراهة التقاطه، بل لا ينبغي ترك الاحتياط بتركه.

مسألة ٦ ـ اللقطة إن كانت قيمتها دون الدرهم جاز تملكها في الحال من دون تعريف و فحص عن مالكها، ولا يملكها قهراً بدون قصد التملك على الأقوى، فان جاء مالكها بعدما التقطها دفعها إليه مع بقائها و ان تملكها على الأحوط لو لم يكن الأقوى، و إن كانت تالفة لم يضمنها الملتقط، و ليس عليه عوضها ان كان بعدالتملك، و كذا قبله ان تلفت من غير تفريط منه، و ان كانت قيمتها درهماً أو أزيد وجب عليه تعريفها والفحص عن صاحبها، فان لم يظفر به فان كانت لقطة الحرم تخير بين أمرين: التصدق بها مع الضمان كاللقطة في غير الحرم أو ابقاؤها و حفظها لمالكها فلا ضمان عليه، و ليس له تملكها، و ان كانت لقطة غيرالحرم تخير بين أمور ثلاثة: تملكها والتصدق بها مع الضمان فيهما و ابقاؤها أمانة بيده من غير ضمان.

مسألة ٧ ـ الدرهم هو الفضة المسكوكة الرائجة في المعاملة، و هو و ان اختلف عياره بحسب الأزمنة والأمكنة الا أن المراد هنا ما كان على وزن إثنتي عشرة حمصة و نصف حمصة و عشرها، و بعبارة أخرى نصف مثقال و ربع عشر المثقال بالمثقال الصيرفي الذي يساوي أربع و عشرين حمصة معتدلة، فالدرهم يقارب نصف ريال عجمي، و كذا ربع روپية انكليزية.

مسألة ٨ ـ المدار في القيمة مكان الالتقاط و زمانه في اللقطة و في الدرهم، فان وجد شيئاً في بلاد العجم مثلاً و كان قيمته في بلد الالتقاط و زمانه أقل من نصف ريال أو وجد في بلاد تكون الرائج فيها الروپية وكان قيمته أقل من ربعها جاز تملكه في الحال و لا يجب تعريفه.

مسألة ٩ ـ يجب التعريف فيما لم يكن أقل من الدرهم فوراً على الأحوط، نعم لا يجوز التسامح و الاهمال والتساهل فيه، فلو أخره كذلك عصى إلا مع العذر، و على أي حال لم يسقط التعريف.

If subsequently its master turns up after a person has picked it up as a *Luqaṭah*, he shall return it to him, according to the more cautious opinion, even if he has included it in his property, though not according to the stronger opinion. If it was something that perishes, he shall not be held responsible (for its loss), and he shall not be liable to pay its substitute once he has made it his property. The same shall be the rule even if it was before he made it his property, if the loss has been without his deliberate negligence

If its price is a Dirham or more, the finder shall be bound to make its announcement and search for its master. If he does not succeed in finding its master, and it is a *Luqaṭah* of *Ḥaram*, he shall have two options : either he may give it in charity with the responsibility (for its loss) as is the case with a non- *Ḥaram Luqaṭah*, or may keep it with him safely on behalf of its master, but he shall have no responsibility (for its loss). But he shall not be allowed to make it is property.

If it was a non-*Ḥaram Luqaṭah*, he shall have three options: he may make it his property, he may give it in charity with responsibility in both cases, or he may keep it with him as a trust in his possession without any responsibility.

Problem # 7. A Dirham is a silver coin current these days in commercial transactions, and its standard has differed according to the difference in places and times, except that we mean the one having its weight of l2 and a half grams and one-tenth of a gram, or, in other words, half and quarter of one tenth *Mithqāl* according to the *Ṣairafī Mithqāl* that is equal to current twenty- four grams. So a Dirham is approximately equal to half of Iranian Rial, or a quarter of an English Rupee (?).

Problem # 8. The criterion for the price and Dirham is the place where a thing is lost and the time it is found. So if a person finds a thing, suppose, in a non-Arab country and its price in the land where it is found and at the time it is found is less than half a Rial, or if he finds it in a country where the currency is Rupee and its price is less than a quarter of a Rupee, the finder may immediately make it his property and he is not bound to make its announcement.

Problem # 9. If a thing lost and found is not less than a Dirham, the finder is bound to makes its announcement immediately, according to the more cautious opinion. Of course, dilly-dallying and unnecessary delay and indolence are not allowed in it. If the finder delays it due to deliberate negligence or indolence, he shall be considered to have committed a sin, except when he does it with some due excuse Anyhow, the condition for making its announcement is not relinquished.

Problem # 10. It is held by some jurists that announcement is not obligatory except in case the finder intends subsequently to make the thing his property, but according to the stronger opinion it is absolutely obligatory, regardless whether the finder intends to make it subsequently his property, or give it in charity or keep it safely for its master, or has no intention whatsoever.

مسألة ١٠ ـ قيل: لا يجب التعريف إلا إذا كان ناو ياً للتملك بعده، و الأقوى وجوبه مطلقا و إن كان من نيته ذلك أو التصدق أو الحفظ لمالكها أو غير ناوٍ لشيء أصلاً.

مسألة ١١ ـ مدة التعريف الواجب سنة كاملة، و لا يشترط فيها التوالي، فان عرّفها في ثلاثة شهور في سنة على نحو يقال في العرف إنه عرّفها في تلك المدة ثم ترك التعريف بالمرة ثم عرفها في سنة أخرى ثلاثة شهور، و هكذا إلى أن كمل مقدار سنة في ضمن أربع سنوات مثلاً كفى في تحقق التعريف الذي هو شرط لجواز التملك و التصدق، و سقط عنه ما وجب عليه و إن كان عاصياً في تأخيره بهذا المقدار إن كان بدون عذر.

مسألة ١٢ ـ لا يعتبر في التعريف مباشرة الملتقط، بل يجوز استنابة الغير مجاناً أو بالأجرة مع الاطمئنان بايقاعه، والظاهر أن أجرة التعريف على الملتقط إلا إذا كان من قصده أن يبقى بيده و يحفظها لمالكه، فان في كون الأجرة على المالك أو عليه تردداً، و الأحوط التصالح.

مسألة ١٣ ـ لو علم بأن التعريف لا فائدة فيه أو حصل له اليأس من وجدان مالكها قبل تمام السنة سقط و تخير بين الأمرين في لقطة الحرم و الأحوط ذلك في لقطة غيره أيضاً.

مسألة ١٤ ـ لو تعذر التعريف في أثناء السنة انتظر رفع العذر، و ليس عليه بعد ارتفاع العذر استئناف السنة، بل يكفي تتميمها

مسألة ١٥ ـ لو علم بعد تعريف سنة أنه لو زاد عليها عثر على صاحبه فهل يجب الزيادة إلى أن يعثر عليه أم لا؟ و جهان، أحوطهما الأول خصوصاً إذا علم بعثوره مع زيادة يسيرة.

مسألة ١٦ ـ لو ضاعت اللقطة من الملتقط و وجدها شخص آخر لم يجب عليه التعريف، بل يجب عليه إيصالها الى الملتقط الأول، نعم لو لم يعرفه وجب عليه التعريف سنة طالباً به المالك أو الملتقط الأول، فأياً منهما عثر عليه يجب دفعها

Problem # 11. The time legally allowed to make announcement is a whole year. There is no condition of sequence in it. If the finder makes announcement for three months in a year in a way it is usually called an announcement during that period, and then he gives it up at all. Then he does so for another three months in the next year, and so on , till he completes the period of one year, say, in four years, it shall be sufficient in fulfilment of the definition of announcement, that is a condition for making the thing his property , or giving in charity. Thus, he is exonerated from what was obligatory on him, though he shall be considered to have sinned due to making so much delay without any due excuse.

Problem # 12. It is not a condition that the finder should make the announcement personally. Rather it is allowed to appoint another gratis or against payment with satisfaction of making the announcement. Apparently the cost of announcement is to be borne by the finder, except when he intends to keep the thing in his possession safely on behalf of its master. There is, however, hesitation in the obligation of the cost on the master or the finder, but it is more cautious to make a compromise.

Problem # 13. If the finder knows that there is no use in making announcement, or despairs of finding the master of the thing before the completion of a whole year, the condition shall be dropped, and he shall have the two options in a *Ḥaram Luqaṭah*, and according to the more cautious opinion, in case of other *Luqaṭah* as well.

Problem # 14. If the finder becomes unable to continue with the announcement during the year due to some excuse, he shall be given more time till the removal of the excuse. After the removal of the excuse, he shall not be obliged to start it anew for a year; rather it shall be sufficient to complete the remaining period of one year.

Problem # 15. If after completing announcement for a year, he comes to know that if he increases the time, he shall be able to find the master of the thing, then is he bound to increase the time until he finds the master or not ? There are two alternatives, the more cautious being the first particularly when he knows that he shall find the master after a slight increase of period.

Problem # 16. If the thing found is lost by the finder, and another person finds it, the latter shall not be bound to make its announcement. Rather he shall be bound to take it to the first finder. Of course, if he does not know him, he shall be bound to make announcement for a year in search of its master or the first finder, so that if he finds either of them, he shall be bound to give over the thing to him, regardless whether the thing was lost by the finder before or after a year of making its announcement.

Problem # 17. If the *Luqaṭah* belongs to category that does not remain unblemished for a year as a foodstuff, melon, meat, fruits or fresh vegetables, the finder may evaluate it himself and eat it or consume it or dispose it off to another person and keep its price for its master. It is more cautious that

إليه من غير فرق بين ما كان ضياعها من الملتقط قبل تعريفه سنة أو بعده.

مسألة ١٧ ـ إذا كانت اللقطة مما لا تبقى لسنة كالطبيخ و البطيخ و اللحم و الفواكه و الخضروات جاز أن يقوّمها على نفسه و يأكلها و يتصرف فيها أو يبيعها من غيره و يحفظ ثمنها لمالكها، والأحوط أن يكون بيعها باذن الحاكم مع الامكان و ان كان الأقوى عدم اعتباره، و الأحوط حفظها الى آخر زمان الخوف من الفساد، بل وجوبه لا يخلو من قوة، و كيف كان لا يسقط التعريف، فيحفظ خصوصياتها و صفاتها قبل أن يأكلها أو يبيعها ثم يعرّفها سنة، فان جاء صاحبها و قد باعها دفع ثمنها اليه، وإن أكلها غرمها بقيمتها، وإن لم يجيء فلا شيء عليه.

مسألة ١٨ ـ يتحقق تعريف سنة بأن يكون في مدة سنة متوالية أو غير متوالية مشغولاً بالتعريف بحيث لم يعدّ في العرف متسامحاً متساهلاً في الفحص عن مالكه، بل عدّوه فاحصاً عنه في هذه المدة، و لا يتقدر ذلك بمقدار معين، بل هو أمر عرفي، و قد نسب الى المشهور تحديده بأن يعرّف في الأسبوع الأول في كل يوم مرة، ثم في بقية الشهر في كل أسبوع مرة، و بعد ذلك في كل شهر مرة، و الظاهر أن المراد بيان أقل مايصدق عليه تعريف سنة عرفاً، و مرجعه إلى كفاية بضع و عشرين مرة بهذه الكيفية، و فيه إشكال من جهة الاشكال في كفاية كل شهر مرة في غير الشهر الأول، و الظاهر كفاية كل أسبوع مرة إلى تمام الحول و الأحوط أن يكون في الأسبوع الأول كل يوم مرة.

مسألة ١٩ ـ محل التعريف مجامع الناس كالأسواق و المشاهد ومحل إقامة الجماعات ومجالس التعازي و كذا المساجد حين اجتماع الناس فيها و إن كره ذلك فيها، فينبغي أن يكون على أبوابها حين دخول الناس فيها أو خروجهم عنها.

مسألة ٢٠ ـ يجب أن يعرّف اللقطة في موضع الالتقاط مع احتمال وجود صاحبها فيه إن وجدها في محل متأهل من بلد أو قرية و نحوهما، ولو لم يقدر على البقاء لم يسافر بها بل استناب شخصاً أميناً ثقة ليعرّفها، و إن وجدها في المفاوز

its sale should be with the permission of the judge, if possible, though, according to the stronger opinion, it is not a condition.

It is more cautious to keep it until the end of the risk of its decomposition. Rather, its obligation is not free form force. Anyhow, the condition of announcement is not relinquished.

Before eating it or disposing it off, the finder must first understand all the characteristics and particular qualities of the thing, and then make its announcement for a year. If its master comes after he has already sold it, he shall give him its price, and if he has eaten it, he shall compensate it by paying its price. If, however, the master does not turn up, he shall be under no liability whatsoever.

Problem # 18. The period of a year of announcement is fulfilled by the finder being busy in the announcement continuously or intermittently in the announcement for year, in a way that he may not usually be called negligent or indolent in making search for the master of the thing, rather he is considered to have search for him during that period. Its time is not prescribed, but it is a matter related to the usual custom. It has been ascribed to a notorious opinion limiting it to making announcement once in every day in the first week, then in the remaining month once in every week, then once in every month

Apparently what is meant is the minimum that may be usually called announcement in a year, and its standard is twenty and some times in this manner. There is, however, some hesitation in accepting it due to the difficulty in accepting the sufficiency of once in every month except in the first month. Apparently it is sufficient to make it once in every week until the completion of the year. It is more cautious to make it once in every day in the first week.

Problem # 19. The places of announcement are where people generally assemble like the markets, holy shrines, places of offering congregational prayers, condolence meetings and likewise mosques at the time the people assemble there, though it is disapproved to make it there, and so it should be made at its gates at the time of the entry of the people in it or their exit from it.

Problem # 20. It is obligatory to make the announcement at the place the thing is lost and found with the likelihood of finding its master there, if the thing is found in a populous city or village.

If the finder is able to stay there, he may not travel with the thing, but appoint some trustworthy person to make announcement on his behalf.

If, however, he has found the thing in jungles, steppes, public highways or the like, he must announce it to those whom he finds there, so that even if some caravan has passed from there, he must

و البراري و الشوارع و أمثال ذلك عرّفها لمن يجده فيها، حتى أنه لو اجتازت قافلة تبعهم و عرّفها فيهم، فان لم يجد المالك فيها أتم التعريف في غير ها من البلاد أيّ بلد شاء مما احتمل وجود صاحبها فيه، و ينبغي أن يكون في أقرب البلدان إليها فالأقرب مع الامكان.

مسألة ٢١ ـ كيفية التعريف أن يقول المنادي: من ضاع له ذهب أو فضة أو ثوب؟ و ما شاكل ذلك من الألفاظ بلغة يفهمها الأغلب، و يجوز أن يقول: من ضاع لهُ شيء أو مال؟ بل ربما قيل: إن ذلك أحوط و أولى، فاذا ادعى أحد ضياعه سأله عن خصوصياته و صفاته و علاماته من وعائه و خيطه و صنعته و أمور يبعد اطلاع غير المالك عليه من عدده و زمان ضياعه و مكانه و غير ذلك ، فاذا توافقت الصفات و الخصوصيات التي ذكرها مع الخصوصيات الموجودة في ذلك المال فقد تم التعريف ، و لا يضر جهله ببعض الخصوصيات التي لا يطلع عليها المالك غالباً و لا يلتفت إليها إلا نادراً ألا ترى أن الكتاب الذي يملكه الانسان و يقرأه و يطالعه مدة طويلة من الزمان لا يطلع غالباً على عدد أوراقه وصفحاته؟ فلو لم يعرف مثل ذلك لكن وصفه بصفات و علامات أخر لا تخفى على المالك كفى في تعريفه و توصيفه.

مسألة ٢٢ ـ إذا لم تكن اللقطة قابلة للتعريف بأن لم تكن لها علامة و خصوصيات ممتازة عن غيرها حتى يصف بها من يدعيها و يسأل عنها الملتقط كدينار واحد من الدنانير المتعارفة غير مصرور و لا مكسور سقط التعريف، و حينئذ هل يتخير بين الأمور الثلاثة المتقدمة من دون تعريف أو يعامل معه معاملة مجهول المالك، فيتعين التصدق به؟ و جهان، أحوطهما الثاني.

مسألة ٢٣ ـ إذا التقط إثنان لقطة واحدة فان كانت دون درهم جاز لهما تملكها في الحال من دون تعريف و كان بينهما بالتساوي، و إن كانت بمقدار درهم فما زاد وجب عليهما تعريفها و إن كانت حصة كل منهما أقل من درهم، و يجوز أن يتصدى للتعريف كلاهما أو أحدهما أو يوزّع الحول عليهما بالتساوي أو

follow it and announce it in it. If its master is not found there. he shall fulfil the announcement in other places wherever he likes in which there is likelihood of the existence of its master there. If possible, the announcement should be made in the cities nearby and then the farther ones.

Problem # 21. The procedure of making announcement is that the caller says: "Who is the person who has lost gold, silver or clothes?", or such words in the language understood by the majority of the people (of the place). It is also allowed to say: "Who is the man who has lost some thing or article?", and sometimes it is said that these words are more cautious and better.

If someone claims his lost thing, he must be asked about its details, characteristics, special qualities and signs about its container, thread, design and other details that are known to others than its master like is number, time and place of its loss, etc. When the qualities and characteristics of the thing agree with what the claimant mentions, the description shall also cease.

There shall be no harm if the claimant does not know some of the details not mostly known to the master and no attention is paid to them except rarely, as you see that a man may read a book and study it for a long time, but does not know about the number of its folios and pages.

So if he does not know some of such details, but has explained other qualities and signs that are not hidden for a master, it shall be sufficient for its introduction and explanation.

Problem # 22. If the qualities of a thing are such that cannot be described so that there are no signs or qualities distinctive from others so that the claimant could mention them or the finder could ask him to explain, like a single Dinar as usually current that is neither in a purse nor is broken , the condition of description shall drop. In such case whether the finder should adopt any of the three options or treat it as a thing whose master is not known and shall decide to give it in charity? There are two alternatives, the more reasonable being the second.

Problem # 23. If two persons find a single lost thing, if it was of less than a Dirham, they may make it their property immediately without making any announcement, and it shall be divided equally between them.

If, however, it was of a Dirham in value or more, he shall be bound to make its announcement, even if the share of each of them is worth less than a Dirham. They are allowed to take up the announcement for both or one of them, or divide the year equally or differently between them.

If they agree to any of the methods, they shall have fulfilled what was obligatory on them and they shall be exonerated from its liability. If they have some dispute, they may divide the year equally between them. The same shall be the case with the proportion of the cost of announcement, if they are required to pay it.

التفاضل، فان توافقا على أحد الأنحاء فقد تأدى ماهو الواجب عليهما وسقط عنهما، و إن تعاسرا يوزّع الحول عليهما بالتساوي، و هكذا بالنسبة إلى أجرة التعريف ـ لو كانت ـ عليهما، و بعدما تم حول التعريف يجوز اتفاقهما على التملك أو التصدق أو الابقاء أمانة، و يجوز أن يختار أحدهما غير ما يختار الآخر بأن يختار أحدهما التملك و الآخر التصدق مثلاً بنصفه، ثم إن تصدى أحدهما لأداء تكليفه من التعريف وترك الآخر عصياناً أو لعذر فالظاهر عدم جواز تملك التارك حصته، و أما المتصدي فيجوز له تملك حصته ان عرّفها سنة، والأحوط لهما في صورة التوافق على التوزيع أن ينوي كل منهما التعريف عنه و عن صاحبه، و الا فيشكل تملكهما، و كذا في صورة التوافق على تصدي أحدهما أن ينوي عن نفسه وعن صاحبه.

مسألة ٢٤ ـ اذا التقط الصبي أو المجنون فما كان دون درهم ملكاه ان قصد وليهما تملكهما، و أما تأثير قصد هما في ذلك فمحل اشكال بل منع، و ما كان مقدار درهم فما زاد يعرّف، و كان التعريف على وليهما، و بعد تمام الحول يختار ما هو الأصلح لهما من التملك لهما و التصدق و الابقاء أمانة.

مسألة ٢٥ ـ اللقطة في مدة التعريف أمانة لا يضمنها الملتقط الامع التعدي أو التفريط، و كذا بعد تمام الحول ان اختار بقاءها عنده أمانة لمالكها، و أما ان اختار التملك أو التصدق فانها تصير في ضمانه كما تعرفه.

مسألة ٢٦ ـ ان وجد المالك و قد تملكها الملتقط بعد التعريف فإن كانت العين باقية أخذها و ليس له الزام الملتقط بدفع البدل من المثل أو القيمة، و كذا ليس له الزام المالك بأخذ البدل. و ان كانت تالفة أو منتقلة الى الغير ببيع و نحوه أخذ بدلها من الملتقط من المثل أو القيمة، و ان وجد بعد ما تصدق بها فليس له أن يرجع العين و ان كانت موجودة عند المتصدق له، و انما له أن يرجع على الملتقط، و يأخذ منه بدل ماله إن لم يرض بالتصدق و ان رضي به لم يكن له الرجوع عليه، و كان أجر الصدقة له. هذا إذا وجد المالك، و أما اذا لم يوجد فلا

After the year for announcement is complete, they shall be allowed to agree on its ownership, giving it in charity or keeping it as a trust. It is allowed for one of them to adopt something different from what is adopted by the other, so that one of them adopts to make it their property, while the other adopts his half, suppose to be given in charity. If one of them takes up the work of announcement, but the other leaves it in defiance or due to some excuse, then apparently the defying person shall not be allowed his share. As regards the other, he shall be allowed his share if he makes the announcement for a year. According to the more cautious opinion, both of them should reach some a compromise on the division so that each of them should intend to make announcement for himself and on behalf of his partner; otherwise, it shall be difficult for them to make it their property. The same shall be the case if they agree to give charge to one of them to make announcement for himself and on behalf of his partner.

Problem # 24. If a lost thing is found by a minor or a lunatic, if it is less than a Dirham in value, they may make it their property if their guardian intends to make it their property. As regards the effect of their intention in it, there is hesitation in accepting. Rather it is forbidden. If the value of the thing is more than a Dirham or more, its announcement shall be made, and their guardian shall be bound to do it. After the completion of the year, the guardian shall decide as to what is in their interest, to make it their property, give it in charity or keep it as a trust.

Problem # 25. A lost and found thing is a trust during the period of announcement, the finder being under no responsibility for it except in case of overstepping his authority or deliberate negligence. The same shall be the case if after the completion of a year, the finder decides to keep as a trust on behalf of its master.. If, however, he decides to make it his property or give it in charity, then he shall be held responsible for it, as you know.

Problem # 26. If the finder finds the master of the lost thing, while he has already made it his property after the announcement, then if the thing itself is intact, the master shall take it back, but he is not allowed to compel the finder to gives it substitute or price. Likewise, the finder shall also not be allowed to compel the master to accept its substitute. If, however, it has perished or has been transferred to another by means of sale or the like, the master shall take its substitute or price from the finder. If the finder finds the master after he has already given it in charity, he shall not be required to return the actual thing, even if it is intact with the person to whom it has been given in charity. The master may have recourse to the finder, and accept from him its substitute, if he does not agree with giving it in charity. If, however, he agrees with giving it in charity, he shall have no recourse to the finder, and the divine reward shall go to him. This is the case when he finds its master.

If, however, the finder fails to find the master of the lost thing, he shall not be held responsible in both the cases.

Problem # 27. The responsibility of the finder for making the announcement is not relinquished after

شيء عليه في الصورتين.

مسألة ٢٧ ـ لا يسقط التعريف عن الملتقط بدفع اللقطة الى الحاكم و ان جاز له دفعها اليه قبل التعريف و بعده، بل إن اختار التصدق بها بعد التعريف كان الأولى أن يدفعها اليه ليتصدق بها.

مسألة ٢٨ ـ لو وجد المالك و قد حصل للقطة نماء متصل يتبع العين فيأخذها بنمائها سواء حصل قبل تمام التعريف أو بعده، و سواء حصل قبل التملك أو بعده، و أما النماء المنفصل فان حصل بعد التملك كان للملتقط، فاذا كانت العين موجودة يدفعها الى المالك دون نمائها، و ان حصل في زمن التعريف أو بعده قبل التملك كان للمالك.

مسألة ٢٩ ـ لو حصل لها نماء منفصل بعد الالتقاط فعرّف العين حولاً و لم يجد المالك فهل له تملك النماء بتبع العين أم لا؟ و جهان، أحوطهما الثاني بأن يعمل معه معاملة مجهول المالك، فيتصدق به بعد اليأس عن المالك.

مسألة ٣٠ ـ ما يوجد مدفوناً في الخربة الدّارسة التي باد أهلها و في المفاوز وكل أرض لارب لها فهو لواجده من دون تعريف، و عليه الخمس مع صدق الكنز عليه كما مر في كتابه، و كذا لواجده ما كان مطروحاً و علم أو ظن بشهادة بعض العلائم و الخصوصيات أنه ليس لأهل زمن الواجد و أما ما علم أنه لأهل زمانه فهو لقطة، فيجب تعريفه إن كان بمقدار الدرهم فمازاد، و قد مرّ أنه يعرّف في أيّ بلد شاء.

مسألة ٣١ ـ لو علم مالك اللقطة قبل التعريف أو بعده لكن لم يمكن الايصال اليه ولا الى وارثه ففي إجراء حكم اللقطة عليه من التخيير بين الأمور الثلاثة أو اجراء حكم مجهول المالك عليه و تعين التصدق به وجهان، و الأحوط إرجاع الأمر الى الحاكم.

مسألة ٣٢ ـ لو مات الملتقط فان كان بعد التعريف و التملك ينتقل الى وارثه، و ان كان بعد التعريف و قبل التملك يتخير وارثه بين الأمور الثلاثة، و إن كان

handing over the thing to the judge, though he is allowed to hand it over to the judge before or after the announcement. Rather even if the finder opts to give it in charity after the announcement, it shall be better for him to hand it over to the judge who may give it in charity.

Problem # 28. If the finder finds the master, while there has occurred some growth in the *Luqaṭah* that is linked with it and is its adjunct, the master shall take it along with its growth, regardless whether it has taken place before or after the announcement, and whether it has taken place before or after the finder has made it his property. As regards the growth separate from the thing, if it has taken place after his making his property, it shall belong to the finder. So if the thing is intact, the finder shall return it to its master without its growth. If, however, it has taken place during the period of announcement or after it before the finder made it his property, it shall belong to its master.

Problem # 29. If the separate growth has taken place after he finds the lost object, and he makes announcement of the thing for a year, but fails to find its master, then shall he be allowed to make it his property in pursuance of the thing itself or not, there are two alternatives for it, the more cautious of them being the second that it should be treated as a thing whose master is not known. So it must be given in charity after despair of finding its master.

Problem # 30. Whatever is found buried in a desolate ruined place whose masters have since migrated, or in jungles or in lands having no owners, it shall belong to its finder without any announcement. He shall be bound to pay Khums if it falls under the category of treasure, as already mentioned under its relevant section. Likewise, it shall belong to the finder if he finds it lying, and he knows or has presumption with evidence of some signs and particulars that it does not belong to the period of the finder. But if it is known that it belongs to the finder's time, it shall be a *Luqaṭah*, so that it shall be obligatory to make its announcement if its value is equal to a Dirham or more. It has already been mentioned that he may make the announcement at any place he likes.

Problem # 31. If the master of the lost and found thing is known before or after making announcement, but it is not possible to have access to him or his heir, then whether the rules of *Luqaṭah* shall apply to it relating to the adoption of any of the three options or of the thing whose master is not known and deciding to give it in charity, there are two alternatives, the more cautious being in favour of referring the matter to the judge.

Problem # 32. If the finder is dead, then if it was after the completion of the announcement and after the thing lost and found has been made his property, it shall be transferred to his heirs. If, however, it was after the announcement but before he has made it his property, his heirs may adopt any of the three options. If it was before the completion of the announcement or during it, then it is not far from treating it as a thing whose master is not known.

Problem # 33. If a person finds some thing in a house of a populous place where someone else is residing, regardless whether it is his property, or on lease or on *'Āriyah*, rather even if it is a usurped one, he shall inform the person living in it. If he claims that it belongs to him, he shall give it over to him without any evidence. If, however, the person living in the house says that he does not know it, then

قبل التعريف أو في أثنائه فلا يبعد جريان حكم مجهول المالك عليه.

مسألة ٣٣ ـ لو وجد مالاً في دار معمورة يسكنها الغير سواء كانت ملكاً له أو مستأجرة أو مستعارة بل أو مغصوبة عرّفه الساكن، فإن ادعى ملكيته فهو له، فليدفع اليه بلا بيّنة، ولو قال: «لا أدري» ففي جريان هذا الحكم إشكال، ولو سلبه عن نفسه فالأحوط إجراء حكم اللقطة عليه، و أحوط منه إجراء حكم مجهول المالك، فيتصدق به بعد اليأس عن المالك.

مسألة ٣٤ ـ لو وجد شيئاً في جوف حيوان قد انتقل اليه من غيره فان كان غير السمك كالغنم و البقر عرّفه صاحبه السابق، فإن ادعاه دفعه اليه، و كذا ان قال: «لاأدري» على الأحوط و ان كان الأقوى أنه لواجده و ان أنكره كان للواجد، و ان وجد شيئاً لؤلؤة أو غيرها في جوف سمكة اشتراها فهو له، و الظاهر أن الحيوان الذي لم يكن له مالك سابق غير السمك بحكم السمك، كما إذا اصطاد غزالاً فوجد في جوفه شيئاً و ان كان الأحوط اجراء حكم اللقطة أو مجهول المالك عليه.

مسألة ٣٥ ـ لو وجد في داره التي يسكنها شيئاً و لم يعلم أنه ما له أو مال غيره فإن لم يدخلها غيره أو يدخلها آحاد من الناس من باب الاتفاق كالدخلانية المعدة لأهله و عياله فهو له، و ان كانت مما يتردد فيها الناس كالبرانية المعدة للأضياف و الواردين و العائدين و المضائف و نحوها فهو لقطة يجري عليه حكمها، و ان وجد في صندوقه شيئاً و لم يعلم أنه ما له أو مال غيره فهو له الا اذا كان غيره يدخل يده فيه أو يضع فيه شيئاً فيعرفه ذلك الغير، فإن أنكره كان له لا لذلك الغير، و ان ادعاه دفعه اليه، و ان قال: «لا أدري» فالأحوط التصالح.

مسألة ٣٦ ـ لو أخذ من شخص مالاً ثم علم أنه لغيره قد أخذ منه بغير وجه شرعي و عدوانا و لم يعرف المالك يجري عليه حكم مجهول المالك لا اللقطة، لما مر من أنه يعتبر في صدقها الضياع عن المالك، و لا ضياع في هذا الفرض، نعم في خصوص ما اذا أودع عنده سارق مالاً ثم تبين أنه مال غيره و لم يعرفه يجب عليه

there is hesitation in applying this rule. If he denies its ownership to himself, then according to the more cautious opinion, it shall be governed by the rules of *Luqaṭah*, and it would be more cautious to apply to it the rules of a thing whose owner is not known, so that it can be given in charity if there is despair of finding its master.

Problem # 34. If one finds a thing in the stomach of an animal transferred to him by some one lese, then if it was some animal other than fish, like a goat or sheep or a cow, he must inform about it to its former master. If he claims it to belong to him, he shall hand it over to him. The same shall be the case, if he says that he does not know anything about it, according to the more cautious opinion, though in such case it would belong to the finder. If he denies that it belongs to him, it shall belong to the finder. If a person finds some pearl etc. in the stomach of a fish he has bought, it shall belong to him. Apparently the case of an animal other than a fish that had previously no master shall be governed by the rule of a fish, as when a person hunts a deer and finds something in its stomach, though it would be more cautious to apply to it the rule of *Luqaṭah* or a thing whose master is not known.

Problem # 35. If a person finds something in the house in which he is residing, does not know whether it belongs to him or to some one else, then if no one else has entered his house, or it is by chance that someone enters the interior part of the house that is meant for his wife and other members of his family, then it must belong to him. If it is found in the part of the house where people frequently visit like the drawing room that is meant for guest, visitors, those who come to enquire about their health, or acquaintances, etc. then it shall be a *Luqaṭah* and its rules shall apply to it. If he finds something in his box (or suit-case), and does not know whether it belongs to him or some one else, then it shall belong to him, except when some one else has put his hand into it or puts something into it, he should inform that person. If he denies that it belongs to him, then it shall belong to himself and not to that other person. If he claims that it belongs to him, he shall hand it over to him. If, however, he says I do not know about it, then it is more cautious to bring about compromise.

Problem # 36. If a person takes something from another, and subsequently comes to know that it belongs to someone else from whom that person has taken without a legal cause or forcibly, but he does not know its master, it shall be governed by the rules of a thing whose master is not known and not of *Luqaṭah*, due to the fact that, as mentioned before, it is a condition for being a *Luqaṭah* that it should have been lost by its master, but in this supposed case, it has not been lost. Of course, in a particular case a thief entrusts something to him, then subsequently it transpires that it belongs to some one else, but he does not know him, he shall be bound to retain it and not return it to the thief, if possible. Then it shall be treated as a *Luqaṭah*. So he shall make its announcement for a year. If its master turns up, he shall hand it over to him; otherwise, he shall give it in charity. If later is master turns up, he shall opt either to have its divine reward or get its compensation. If he opts for the divine reward, he shall get it. If, however, he opts for its compensation. he shall get its compensation, and the divine

أن يمسكه ولا يردّه الى السارق مع الامكان ثم هو بحكم اللقطة فيعرّفه حولاً، فإن أصاب صاحبه ردّه عليه، و الا تصدق به، فإن جاء صاحبه بعد ذلك خيره بين الأجر و الغرم، فإن اختار الأجر فله، و ان اختار الغرم غرم له و كان الأجر له، و ليس له على الأحوط أن يتملكه بعد التعريف، فليس هو بحكم اللقطة من هذه الجهة.

مسألة ٣٧ ـ لو التقط شيئاً فبعد ما صار في يده ادعاه شخص حاضر و قال: «إنه مالي» يشكل دفعه إليه بمجرد دعواه، بل يحتاج إلى البيّنة إلا إذا كان بحيث يصدق عرفاً أنه في يده، أو ادعاه قبل أن يلتقطه، فيحكم بكونه ملكاً للمدعي، و لا يجوز له أن يلتقطه.

مسألة ٣٨ ـ لا يجب دفع اللقطة إلى من يدعيها إلا مع العلم أو البينة و إن وصفها بصفات و علامات لا يطلع عليها غير المالك غالباً إذا لم يفد القطع بكونه المالك، نعم نسب إلى الأكثر أنه إن أفاد الظن جاز دفعها اليه، فإن تبرع بالدفع لم يمنع، و إن امتنع لم يجبر، و هو الأقوى و إن كان الأحوط الاقتصار في الدفع على صورة العلم أو البينة.

مسألة ٣٩ ـ لو تبدل مداسه بمداس آخر في مسجد أو غيره أو تبدل ثيابه في حمام أو غيره بثياب آخر فإن علم أن الموجود لمن أخذ ما له جاز أن يتصرف فيه بل يتملكه بعنوان التقاص عن ماله إذا علم أن صاحبه قد بدّله متعمداً، و جريان الحكم في غير ذلك محل إشكال و ان لا يخلو من قرب لكن بعد الفحص عن صاحبه و اليأس منه، و كذا يجب الفحص في صورة تعمده، نعم لو كان الموجود أجود مما أخذ يلاحظ التفاوت فيقوّمان معاً و يتصدق مقدار التفاوت بعد اليأس عن صاحب المتروك، و ان لم يعلم بأن المتروك لمن أخذ ماله أو لغيره يعامل معه معاملة مجهول المالك، فيتفحص عن صاحبه و مع اليأس عنه يتصدق به، بل الأحوط ذلك أيضاً فيما لو علم أن الموجود للآخذ لكن لم يعلم أنه قد بدل متعمداً.

reward shall belong to the former. But the person shall not be entitled to make its property after having made announcement, and in this respect it shall not be governed by the relevant rules of *Luqaṭah*.

Problem # 37. If a person finds a thing, and after he seizes it, another person present there claims that it belongs to him, and says that it is his property. There shall be hesitation in giving it over to him by his mere claim, but it shall require the production of legal evidence, except that it may usually be proved that it was in his possession, or when he claims to be its owner before the first person seizes it. Then it shall be declared to be the property of the claimant, and the other person shall not be allowed to seize it as a *Luqaṭah*.

Problem # 38. It is not obligatory to give over the lost and found thing to one who claims that it belongs to him, except with its knowledge and legal evidence, even if he describes its qualities and signs that are not known mostly to any person other than the master of a thing, unless full certainty is not reached about his being its real master. Of course, according to the opinion ascribed to most of the jurists, if there is assumption, it shall be lawful to hand it over to him. So if the finder voluntarily delivers the thing, he shall not be stopped. If, however, he not willing to hand it over, he shall not be compelled, and this opinion is stronger, though, according to the more cautious opinion, the delivery of the *Luqaṭah* must be confined to knowledge and legal evidence.

Problem # 39. If the shoes of a person are changed with other shoes in a mosque, etc. or his clothes are changed in a public bath (*Ḥammām*), etc. with other clothes, then if he knows that what is lying there belongs to the person who has taken away his things, he shall be allowed to seize what is lying there; rather, he shall be allowed to own it in requital (*Tuqāṣ*) of his lost property, if he knows that the proprietor of the things left there has changed them deliberately. There is hesitation in the application of this rule in cases other than such case, although it is not free from being close to the rule that he should do so after having carried search for their master and having despaired of finding him. Likewise, it is obligatory to make search for the master even in case he has deliberately done it. Of course, if the articles lying are of a better quality, consideration must be made for the difference, and they must be evaluated, and the difference given in charity after having despaired of finding master of the things left there. If he does not know whether the things lying there belong to the person who has taken away his things or to some one else, the mater shall be treated as one relating to a thing whose master is not known. So a thorough search shall be made to find their master, and in case of despair, they shall be given in charity. Rather to be more cautious, the same shall be the rule in case he knows that the things lying there belong to the person who has taken away his things, but is not sure that he has done it deliberately.

خاتمة:

اذا وجد صبياً ضائعاً لا كافل له و لا يستقل بنفسه على السعي فيما يصلحه و الدفع عما يضرّه و يهلكه ـ و يقال له: اللقيط ـ يجوز بل يستحب التقاطه و أخذه بل يجب مقدمة ان توقف حفظه عليه لو كان في معرض التلف، سواء كان منبوذاً قد طرحه أهله في شارع أو مسجد و نحو هما عجزاً عن النفقة أو خوفاً من التهمة أو غيره، بل و ان كان مميزاً بعد صدق كونه ضائعا تائهاً لا كافل له، و بعد ما أخذ اللقيط و التقطه يجب عليه حضانته وحفظه و القيام بضرورة تربيته بنفسه أو بغيره، و هو أحق به من غيره الى أن يبلغ فليس لأحد أن ينتزعه من يده و يتصدى حضانته غير من له حق الحضانة شرعاً بحق النسب كالأبوين و الأجداد و سائر الأقارب، أو بحق الوصاية كوصيّ الأب أو الجد اذا وجد أحد هؤلاء، فيخرج بذلك عن عنوان اللقيط، لوجود الكافل له حينئذ، و اللقيط من لا كافل له، و كما لهؤلاء حق الحضانة فلهم انتزاعه من يد آخذه كذلك عليهم ذلك، فلو امتنعوا أجبروا عليه.

مسألة ١ ـ اذا كان للقيط مال من فراش أو غطاء زائدين على مقدار حاجته أو غير ذلك جاز للملتقط صرفه في إنفاقه باذن الحاكم أو وكيله، و مع تعذرهما و تعذر عدول المؤمنين على الأحوط جاز له ذلك بنفسه، و لا ضمان عليه، و ان لم يكن له مال فإن وجد من ينفق عليه من حاكم بيده بيت المال أو من كان عنده حقوق تنطبق عليه من زكاة أو غيرها أو متبرع كان له الاستعانة بهم في إنفاقه أو الانفاق عليه من ماله، و ليس له حينئذ الرجوع على اللقيط بما أنفقه بعد بلوغه و يساره و ان نوى الرجوع عليه، و ان لم يكن من ينفق عليه من أمثال ما ذكر تعيّن عليه و كان له الرجوع عليه مع قصد الرجوع لا بدونه.

CONCLUSION

If a person finds a lost baby having no one to support it and who is not able to make effort for what is its interest or guard itself against what is harmful to or fatal for it, who is called a *Laqīṭ* (or Foundling), it is allowed, rather approved, to pick it up and keep it, rather it is obligatory as a preliminary act if its safety depends on it if there is a risk of its annihilation, regardless whether it is a discarded baby who has been abandoned by its relatives on the public thoroughfare, mosque, or the like due to inability to support it or for fear of disgrace, etc.; rather even if the child is discreet when belongs to the category of a lost and straying child having no one to support it. After a person picks up a foundling, and keeps it with him, he is bound to arrange for his custody and protection and take action for the need of its upbringing by himself or by someone else. He shall have a preferential right for it than any one else until he attains maturity. So no one shall have the right to remove it from him and take up its custody other than one who is legally entitled to its custody by virtue of parentage (*Nasab*) like its parents and grandparents and other close relatives or by virtue of testamentary disposition as the executor appointed by its father or grandfather if any one of them is available. Then he shall get out of the category of a foundling, due to the existence of a supporter in this case, as a foundling is one who has no supporter.

As they are entitled to the right of custody and take it away from the person picking it up, they are also obliged to do it, so that if they refuse to do it, they may be compelled to do so.

Problem # 1. If the foundling has some property like bedding or quilt extra than its requirement, etc., is finder may spend it for its maintenance with the permission of the judge or its representative.

If there is none of such things and in the absence of just believers, according to the more cautious opinion, the finder shall be allowed to take it up himself, without any responsibility on him.

If he has no property, then if he finds some one who is ready to spend on it like the judge who may spend from the state treasury, or one who has funds for such purpose as Zakāt , etc. , or volunteer, the finder can ask them to help him for spending on the child or append on it out of his own money. But he shall not be entitled to have recourse to the foundling for what he spend on it after its maturity or affluence, even if he had the intention to have recourse to it.

If there is no one from among those mentioned who may spend on the child, the finder shall be bound to do it himself. If he intends to have recourse to the child, he shall be entitled to do so, but

مسألة ٢ ـ يشترط في الملتقط البلوغ و العقل و الحرية، و كذا الاسلام ان كان اللقيط محكوماً بالاسلام.

مسألة ٣ ـ لقيط دارالاسلام محكوم بالاسلام، و كذا لقيط دار الكفر اذا وجد فيها مسلم احتمل تولد اللقيط منه، و ان كان في دارالكفر و لم يكن فيها مسلم أو كان و لم يحتمل كونه منه يحكم بكفره، و فيما كان محكوماً بالاسلام لو أعرب عن نفسه الكفر بعد البلوغ يحكم بكفره، لكن لا يجري عليه حكم المرتد الفطرى على الأقوى.

not if he has had no such intention.

Problem # 2. It is a condition that the person who picks up a foundling and keeps it with him must be an adult, sane, and free. Likewise, there is the condition of Islam, if the foundling is governed by Islamic law.

Problem # 3. A foundling in a *Dār al-Islām* (an Islamic state) is governed by Islamic law. Similar is the case with the foundling of *Dār al-Kufr* (an un-Islamic state), if a Muslim is found in it due to the likelihood of the foundling to be born to him. If the foundling is found in a *Dār al-Kufr*, where there is no Muslim, or there is a Muslim, but it is not likely to be born to him, the foundling shall be governed by un-Islamic law. In case a foundling who is governed by Islamic law opts to be governed by un-Islamic law after attaining maturity, he shall be allowed to be governed by un-Islamic law, but the law of natural born apostate (or one born of Muslim parents) shall not apply to him, according to the sronger opinion.

كتاب النكاح

و هو من المستحبات الأكيدة، و ما ورد في الحث عليه و الذم على تركه مما لا يحصى كثرة، فعن مولانا الباقر عليه السلام قال: «قال رسول الله صلى الله عليه و آله: ما بني بناء في الاسلام أحب الى الله عزّوجل من التزويج» وعن مولانا الصادق عليه السلام «ركعتان يصليهما المتزوج أفضل من سبعين ركعة يصليها عزب» و عنه عليه السلام قال: «قال رسول الله صلى الله عليه و آله: رذال موتا كم العزاب» و في خبر آخر عنه صلى الله عليه و آله «أكثر أهل النار العزاب» و لا ينبغي أن يمنعه الفقر و العيلة بعد ما وعد الله عزوجل بالاغناء و السعة بقوله عزّ من قائل «إن يكونوا فقراء يغنهم الله من فضله» فعن النبي صلى الله عليه و آله «من ترك التزويج مخافة العيلة فقد أساء الظن بالله عزوجل» هذا.

و مما يناسب تقديمه على مقاصد هذا الكتاب أمور: بعضها متعلق بمن ينبغي اختياره للزواج و من لا ينبغي، و بعضها في آداب العقد، و بعضها في آداب الخلوة مع الزوجة، و بعضها من اللواحق التي لها مناسبة بالمقام، و هي تذكر في ضمن مسائل.

مسألة ١ ـ مما ينبغي أن يهتم به الانسان النظر في صفات من يريد تزويجها،

SECTION THIRTY-EIGHT

MARRIAGE – (*NIKĀḤ*)

Contracting marriage (*Nikāḥ*) is one of the emphatically approved acts. The traditions in favour of its recommendation to contract it and condemnation of giving it up are innumerable. So it has been related from our master, (Imām Muḥammad) al-Bāqir, (A.S.), that the holy Prophet, PBUH, has said: "No building has been built in Islam dearer to Allāh, the Revered and Glorious, than contracting Marriage." It has been related from our master, (Imām Ja'far) al-Ṣādiq saying: "Two *Rak'ats* of prayers offered by a married person are superior to seventy *Rak'ats* of prayers offered by a bachelor." He is also reported to have said: "The holy Prophet, PBUH, has said that the meanest of your dead are the bachelors."

Another Tradition from the holy Prophet, PBUH, says: "Most of the people in the Hell shall be bachelors." Poverty and indigence should not prevent a person (from contracting marriage), when Allāh, the Revered and Glorious, by saying: "If they happen to be poor, Allāh shall make them free from want by his Favour."

The holy Prophet, PBUH, is reported to have said: "Whosoever gives up contracting marriage for fear of indigence certainly harbours a bad opinion about Allāh, the Revered and Glorious."

Before dealing with the objectives of this Section (on Marriage), it is desirable to mention some preliminary instructions relating to who should be selected and who should not be selected for marriage, some of the etiquettes of marriage, some of the etiquettes relating to privacy with the wife, and some of the appendages that suit the position. They shall be mentioned during the discussion on various Problems.

Problem # 1. One of the things a man has to attach utmost importance is the qualities in the woman whom he selects for marriage. It has been reported from the Holy Prophet (PBUH) that he

فعن النبي صلى الله عليه و آله «اختاروا لنطفكم فان الخال أحد الضجيعين» و في خبر آخر «تخيروا لنطفكم فان الأبناء تشبه الأخوال» و عن مولانا الصادق عليه السلام لبعض أصحابه ـ حين قال: قد هممت أن أتزوج: «أنظر أين تضع نفسك و من تشركه في مالك و تطلعه على دينك و سرك ، فان كنت لابد فاعلاً فبكراً تنسب إلى الخير و حسن الخلق» الخبر، و عنه عليه السلام «انما المرأة قلادة، فانظر ما تتقلد، و ليس للمرأة خطر لا لصالحتهن و لا لطالحتهن، فأمّا صالحتهن فليس خطرها الذهب و الفضة، هي خير من الذهب و الفضة، و أما طالحتهن فليس خطرها التراب، التراب خير منها» و كما ينبغي للرجل أن ينظر فيمن يختارها للتزويج كذلك ينبغي ذلك للمرأة و أوليائها بالنسبة إلى الرجل، فعن مولانا الرضا عن آبائه عليهم السّلام عن رسول الله صلى الله عليه و آله أنه قال: «النكاح رق، فاذا أنكح أحدكم و ليدته فقد أرقها، فلينظر أحدكم لمن يرق كريمته».

مسألة ٢ ـ ينبغي أن لا يكون النظر في اختيار المرأة مقصوراً على الجمال و المال، فعن النبي صلى الله عليه و آله «من تزوج امرأة لا يتزوجها إلا لجمالها لم يرفيها ما يحب، و من تزوجها لمالها لا يتزوجها إلا له و كله الله إليه، فعليكم بذات الدين» بل يختار من كانت واجدة لصفات شريفة صالحة قد وردت في مدحها الأخبار فاقدة لصفات ذميمة قد نطقت بذمها الآثار، و أجمع خبر في هذا الباب ما عن النبي صلى الله عليه و آله أنه قال: «انّ خير نسائكم الولود الودود العفيفة، العزيزة في أهلها، الذليلة مع بعلها المتبرجة مع زوجها، الحصان على غيره، التي تسمع قوله و تطيع أمره ـ إلى أن قال ـ ألا أخبركم بشرار نسائكم؟ الذليلة في أهلها، العزيزة مع بعلها، العقيم الحقود التي لا تتورع من قبيح، المتبرجة إذا غاب عنها بعلها الحصان معه إذا حضر، لا تسمع قوله، و لا تطيع أمره، و إذا خلا بها بعلها تمنعت منه كما تمنع الصعبة عن ركوبها، لا تقبل منه عذراً و لا تغفر له ذنباً» و في خبر آخر عنه صلى الله عليه و آله «إياكم و خضراء

has said: "Select for your children (chaste women). A nurse is one of the two bed-fellows." Another tradition says: "Select for your children (chaste women). Certainly children resemble their nurses." It has been reported from our master, (Imām) al-Ṣādiq by one of his companions who has said: "I intended to contract a marriage, (when the Imām said: "Look to whom are you entrusting your *Nafs* (self or soul), whom are you accepting as a partner in your property, and whom are you informing about your faith and your secrets? It is indispensable to contract marriage, select a virgin who is attributed with virtue and good habits." It has also been reported from him, (that he has said:) "A woman is a leash (or collar). Look whose leash are you putting on your neck. A woman cannot be evaluated, whether from among the virtuous or the wicked. As regards the virtuous from among the women, they cannot be evaluated in terms of gold and silver, as they are better than gold and silver. But as regards the wicked from among them, their value is less than dust. Rather dust is better than them."

As it is the duty of the man to see whom he is selecting for marriage, in the same way it is also the duty of the woman and her guardians to be careful in their selection of the husband. It has been reported from our master, (Imām 'Alī) al-Riḍā through his ancestors from the holy Prophet, (PBUH), that he has said: "Marriage is bondage. When any of you contracts his daughter in marriage, he has given her in bondage. He must see in whose bondage he is giving his dear one."

Problem # 2. In the selection of a woman, one should not take into consideration her beauty and wealth. So it has been reported from the holy Prophet, (PBUH), that he has said: "When a man marries a woman, he must not marry her for her beauty, what he loves shall not be a source of ease and comfort for him. One who marries a woman solely for the sake of her wealth, Allāh shall give him in the custody of her wealth. So you should consider one who is adherent to her faith."

Rather one must select a woman who is the possessor of noble qualities. Several traditions have come down in praise of women who do not possess the characteristics that are condemned in the traditions.

There is a report that contains such qualities in entirety, that has been transmitted from the holy Prophet, PBUH, in which he has said: "Certainly the best of your women is one who is capable of begetting children, who is loving and chaste, respectable in the eyes of her family, humble before her husband, play up her charms before her husband, hide her (adornments) from others than the husband, who listens to her husband and obeys his orders, until he said : Beware, I inform you about the worst of your women. She is one who is detestable in the eyes of her family, immodest before her husband, sterile, spiteful, not restraining from evil, who displays her charms in the absence of her husband and hides her adornments in his presence, who does not listen to her husband, nor obeys his commands, when she in privacy with her husband she does not let him enjoy her as a stubborn mare does not let her rider ride her , who neither accepts her husband's excuse, nor does she ignore his sins."

الدمن، قيل يا رسول الله: و ما خضراء الدمن؟ قال: المرأة الحسناء في منبت السوء».

مسألة ٣ ـ يكره تزويج الزانية و المتولدة من الزنا و أن يتزوج الشخص قابلته أو ابنتها.

مسألة ٤ ـ لا ينبغي للمرأة أن تختار زوجاً سيّىء الخلق و المخنّث و الفاسق و شارب الخمر.

مسألة ٥ ـ يستحب الاشهاد في العقد و الاعلان به والخطبة أمامه، أكملها ما اشتملت على التحميد و الصلاة على النبي صلى الله عليه و آله و الأئمة المعصومين(ع) و الشهادتين و الوصية بالتقوى و الدعاء للزوجين و يجزي الحمد لله و الصلاة على محمد و آله، بل يجزي التحميد فقط و إيقاعه ليلاً، و يكره إيقاعه و القمر في برج العقرب و إيقاعه في محاق الشهر و في أحد الأيام المنحوسة في كل شهر المشتهرة في الألسن بكوامل الشهر، و هي سبعة: الثالث و الخامس و الثالث عشر و السادس عشر والحادي و العشرون و الرابع والعشرون و الخامس و العشرون.

مسألة ٦ ـ يستحب أن يكون الزفاف ليلاً و الوليمة في ليله أو نهاره فانها من سنن المرسلين و عن النبي صلى الله عليه و آله «لا وليمة إلا في خمس في عرس او خرس أو عذار أو وكار أو ركاز» يعني للتزويج أو ولادة الولد او الختان او شراء الدار أو القدوم من مكة، و انما تستحب يوماً أو يومين لا أزيد للنبوي «الوليمة في الأول حق، و يومان مكرمة، و ثلاثة أيام رياء و سمعة» و ينبغي أن يدعى لها المؤمنون، و يستحب لهم الاجابة و الأكل و ان كان المدعو صائماً نفلاً، و ينبغي أن يعم صاحب الدعوة الأغنياء و الفقراء، و أن لا يخصها بالاغنياء، فعن النبي صلى الله عليه و آله «شر الولائم أن يدعى لها الأغنياء و يترك الفقراء».

مسألة ٧ ـ يستحب لمن أراد الدخول بالمرأة ليلة الزفاف أو يومه أن يصلي ركعتين ثم يدعو بعدهما بالمأثور، و أن يكونا على طهر، و أن يضع يده على ناصيتها

There is another report from the holy Prophet, (PBUH), in which he has said: "Keep yourself away from a fresh vegetable that grows on a filthy land.". He was asked as to what he meant by "a fresh vegetable growing on a filthy land, to which he replied: "(It means) a beautiful woman grown up in a wicked environment."

Problem # 3. It is abominable to marry an adulteress, or a woman born of adultery. It is also disapproved for a man to marry a woman who has nursed him or her daughter.

Problem # 4. A woman should not marry a man who is evil-natured, hermaphrodite, depraved, and drinker of wine.

Problem # 5. It is approved to have witnesses in a marriage contract, to pronounce it in public and to recite a *Khuṭbah* before pronouncing it. the most complete one comprising Praise of Allāh, Blessing on the holy Prophet. PBUH), and the Impeccable Imāms, A.S., the two formulas of *Shahādat*. (namely, I bear witness that there is no god but Allāh, and that Muḥammad is His Servant and His Messenger), exhortation to do good , and prayer for the husband and wife, though it is sufficient to praise Allāh only, and to pronounce the contract at night. It is abominable to do so while the moon in the Scorpio, or pronounce it waning of the month (during the moonless nights, the last few nights when the moon does not appear on the horizon), or in any of the inauspicious days in every month that are called in public jargon as complementary days of the month (*Kawāmil al-Shahr*). and they are seven in number, namely, the third. fifth, thirteenth. sixteenth. twenty-first, twenty-fourth and twenty-fifth.

Problem # 6. It is recommended that the wedding (*Zafāf*) should be at night, and the *Walīmah* (the wedding feast or banquet) on the wedding night or day, as it is a tradition of the prophets. The holy Prophet, PBUH, is reported to have said: "There is no *Walīmah* or banquet except on the occasion of wedding, child-birth, circumcision (of the child), purchase of a house or return from Mecca after the performance of Ḥajj pilgrimage. It is approved that the *Walīmah* should be for one or two days and not more , as the Prophet's tradition says: "*Walīmah* on the first day is right, on for two days a sign of magnanimity, and for three days a sign of hypocrisy and desire for gaining popularity (*Sum'ah)*. The believers (only) should be invited for it, and it is approved to accept the invitation for it and to dine in it. even if the invitee is keeping an approved (and not obligatory) fast. The host must invite the rich and poor alike, and should not make it exclusive for the rich. So the holy Prophet, PBUH, is reported to have said: "The worst of *Walīmahs* is the one in which the host invites the rich and excludes the poor."

Problem # 7. It is recommended for the man who intends to consummate with his wife on the night or day of his wedding that he should offer two *Rak'ats* of prayers and recite the supplication (*Du'ā'*) that has come down from the Impeccable Imāms, and that both the husband and wife must be clean, and

مستقبل القبلة، و يقول: «أللهم على كتابك تزوجتها، و في أمانتك أخذتها، و بكلماتك استحلت فرجها، فان قضيت في رحمها شيئاً فاجعله مسلماً سوياً، و لا تجعله شرك شيطان».

مسألة ٨ ـ للخلوة بالمرأة مطلقاً ولو في غير الزفاف آداب، وهي بين مستحب و مكروه.

أما المستحبة فمنها ـ أن يسمّي عند الجماع، فانه وقاية عن شرك الشيطان، فعن الصادق عليه السلام «انه إذا أتى أحدكم أهله فليذكر الله، فان لم يفعل و كان منه ولد كان شرك شيطان» و في معناه أخبار كثيرة.

ومنها ـ أن يسأل الله تعالى أن يرزقه ولداً تقياً مباركاً زكياً ذكراً سوياً.

ومنها ـ أن يكون على وضوء سيما إذا كانت المرأة حاملاً.

و أما المكروهة فيكره الجماع في ليلة خسوف القمر، و يوم كسوف الشمس، و يوم هبوب الريح السوداء و الصفراء و الزلزلة، و عند غروب الشمس حتى يذهب الشفق، و بعد طلوع الفجر إلى طلوع الشمس، و في المحاق، و في أول ليلة من كل شهر ما عدا شهر رمضان، و في ليلة النصف من كل شهر و ليلة الأربعاء، و في ليلتي الأضحى و الفطر، و يستحب ليلة الاثنين و الثلاثاء و الخميس و الجمعة و يوم الخميس عند الزوال، و يوم الجمعة بعد العصر، و يكره الجماع في السفر إذا لم يكن معه ماء يغتسل به، و الجماع و هو عريان و عقيب الاحتلام قبل الغسل، نعم لا بأس بأن يجامع مرات من غير تخلل الغسل بينها و يكون غسله أخيراً، لكن يستحب غسل الفرج و الوضوء عند كل مرة و أن يجامع و عنده من ينظر إليه حتى الصبي و الصبية، و الجماع مستقبل القبلة و مستدبرها، و في السفينة، والكلام عند الجماع بغير ذكر الله، و الجماع و هو مختضب أو هي مختضبة، و على الامتلاء من الطعام، فعن الصادق عليه السلام «ثلاث يهدمن البدن و ربما قتلن، دخول الحمام على البطنة، و الغشيان على الامتلاء، و نكاح العجائز» و يكره الجماع قائماً، و تحت السماء، و تحت

husband should place his hand on the forehead of the bride facing the *Qiblah* and say: "O Allāh , I have married her according to Thy Book, and have taken her in Thy Custody, and have considered her female organ as lawful to myself according to Thy Words. So if Thou hast decided to put any soul in her womb, make him/her a Muslim and sound, and not a partner of the Devil."

Problem # 8. There are etiquettes for retirement with the wife, even after the wedding night. They relate to both approved and abominable acts.

A- The approved Acts

As regards the Etiquettes relating to Approved Acts, they are the following.

I. The husband must recited *Bismillāh (al-Raḥmān al-Raḥīm).* (I begin with the Name of Allāh, the Compassionate, the Merciful) before having intercourse with the wife. It guards against the participation of the Devil. It has been reported from (Imām Ja'far) al-Ṣādiq, A.S., that he has said: "When anyone of you has intercourse with his wife, he must remember Allāh. If he does not do so, and a son is born to him, he shall have the Devil as his partner."

2. He must ask Allāh, the Exalted, that He may bless him with God-fearing auspicious, pious, male, and well-proportioned child.

3. He must perform ritual ablution, particularly if the wife is pregnant.

B – The Abominable Acts

As regards the Etiquettes relating to the Abominable Act, they are as follows:

Intercourse with the wife is abominable at the night of lunar eclipse, on the day of solar eclipse, on the day of the black and yellow winds and earth-quake, at the time of sunset until the twilight disappears, after the dawn-break until the sunrise, during the moonless nights (*Muḥāq*), on the first night of every month except of the month of Ramaḍān, on the night of the middle of the month, on Wednesday night, on the night of the Eid al-Fiṭr and Eid al-Aḍḥā. It is, however, approved to have intercourse with the wife on Monday, Tuesday and Thursday around noon, on Friday in the afternoon .It is disapproved during journey, when the husband has no water for performing the ritual bath. Likewise, it is abominable for the husband to have intercourse after becoming entirely naked, and after having nocturnal pollution before performing the ritual bath. There is, however, nothing objectionable if the husband performs intercourse several times without intervening ritual bath, and to have the ritual bath after the last intercourse. It is, however, approved to wash the female organ and perform ablution ever time.It is disapproved to perform intercourse while there is any one looking, even if it is a male or female child, or while facing the Qiblah or having one's back towards it, or in a ship, or to talk while performing the intercourse other than remembering Allāh, or to have intercourse while either of the wife or husband

الشجرة المثمرة، و يكره أن تكون خرقة الرجل و المرأة واحدة، بل يكون له خرقة و لها خرقة، و لا يمسحا بخرقة واحدة فتقع الشهوة على الشهوة، ففي الخبر «إن ذلك يعقب بينهما العداوة».

مسألة ٩ ـ يستحب التعجيل في تزويج البنت و تحصينها بالزوج عند بلوغها، فعن الصادق عليه السلام «من سعادة المرء أن لا تطمث ابنته في بيته» و في الخبر «ان الأبكار بمنزلة الثمر على الشجر إذا أدرك ثمارها فلم تجتن أفسدته الشمس و نثرته الرياح، وكذلك الأبكار إذا أدركن ما تدرك النساء فليس لهن دواء إلا البعولة» و أن لا يرد الخاطب إذا كان من يرضى خلقه ودينه و أمانته، و كان عفيفاً صاحب يسار، و لا ينظر إلى شرافة الحسب و علو النسب، فعن علي عليه السلام عن النبي صلى الله عليه و آله «إذا جاء كم من ترضون خلقه و دينه فزوّجوه، قلت: يا رسول الله و إن كان دنياً في نسبه، قال: إذا جاء كم من ترضون خلقه و دينه فزوّجوه، إلا تفعلوه تكن فتنة في الأرض و فساد كبير».

مسألة ١٠ ـ يستحب السعي في التزويج و الشفاعة فيه و إرضاء الطرفين فعن الصادق عليه السلام قال: «قال أميرالمؤمنين عليه السلام: أفضل الشفاعات أن تشفع بين إثنين في نكاح حتى يجمع الله بينهما» و عن الكاظم عليه السلام قال: «ثلاثة يستظلون بظل عرش الله يوم القيامة يوم لا ظل إلا ظله: رجل زوج أخاه المسلم أو أخدمه أو كتم له سراً» و عن النبي صلى الله عليه و آله «من عمل في تزويج بين مؤمنين حتى يجمع بينهما زوجه الله ألف امرأة من الحورالعين كل امرأة في قصر من درّ و ياقوت، و كان له بكل خطوة خطاها أو بكل كلمة تكلم بها في ذلك عمل سنة قام ليلها و صام نهارها، و من عمل في فرقة بين امرأة و زوجها كان عليه غضب الله و لعنته في الدنيا و الآخرة، و كان حقاً على الله أن يرضخه بألف صخرة من نار، و من مشى في فساد ما بينهما و لم يفرق كان في سخط الله عزوجل و لعنته في الدنيا و الآخرة، و حرّم عليه النظر إلى وجهه».

have applied hair-dye (before washing it), or after having eaten to one's fill. It has been reported from (Imām) al-Ṣādiq A.S., that he has said: "Three things destroy one's body and sometimes prove fatal: Entering Ḥammām (or taking a bath) with full stomach, or perform intercourse with a woman in such condition, or marry an old woman."It is also disapproved to perform intercourse while standing, or under the sky or a fruit-bearing tree, or use the same rag by the husband and wife for cleaning the semen, as it gives rise to further carnal desire, while there is report saying that it produces enmity between the husband and wife.

Problem # 9. It is approved to make hurry in giving one's daughter in marriage and give her in the protection of her husband after she attains maturity. It has been reported from (Imām Ja'far) al-Ṣādiq, A.S., that he has said: "It is sign of good luck of a man not to retain his daughter after she starts having menstruation." There is another report that says: "The virgin girls are like the fruits on the trees, when their fruits are ripe and they are not plucked, they become rotten by the sun and scattered by the winds. The same is the case with virgin girls. When they reach the stage the women reach, they have no remedy but marriage". One must not reject the proposal of a suitor if he happens to be one having desirable character, faith and trustworthiness, and also modest and has come affluence. He must not look for the nobility of lineage and greatness of family background. It has been reported by (Imām) 'Alī, A.S., from the holy Prophet, PBUH, that he has said: "When a suitor comes to you whose character and faith is liked by you, give him your daughter in marriage. I asked him: Even if he is of a low descent? The holy Prophet reiterated: When a suitor comes to you whose character and faith is to your liking, give your daughter in marriage to him. If you do not do so, there will be disorder and perversion in the world."

Problem # 10. It is approved to make effort in arranging marriage, make intercession for it and bring about agreement between both the parties (to marriage). So it has been reported from (Imām Ja'far) al-Ṣādiq, A.S., saying: "Amīr al-Mu'minīn (Imām 'Alī), A.S., has said that the best intercession is to mediate between the two parties in marriage until Allāh brings union between both of them." (Imām Mūsā) al-Kāẓim is reported to have said: "Three persons shall seek shelter under the shade of Allāh's Throne on the Day of Resurrection, the day when there shall be no shade except His Shade. They are: one who has arranged marriage for his brother Muslim, has done some service to him, or has kept his secret." It has also been reported from the holy Prophet, PBUH, saying; "One who performs an act for marriage between believers until union is brought between both of them, Allāh shall marry a thousand women from among the dark-eyed Houries, each of them in a palace of pearls and rubies. For every step he has taken and for every word he has spoken in that effort, he shall get the reward of standing in worship throughout the nights and keeping fast throughout the days of a year. (On the other hand), one who acts for bringing about separation between a husband and wife, he shall suffer Allāh's Wrath and His Curse in the world and Hereafter, Allāh shall have the right to smash him with a thousand stones of fire. One who tries to bring about difference between them short of separation, he shall be under the Anger of Allāh, the Exalted, the Glorious, and His Curse in the world and Hereafter, and he shall be forbidden to see His Face."

مسألة ١١ ـ المشهور الأقوى جواز وطء الزوجة دبراً على كراهية شديدة، و الأحوط تركه خصوصاً مع عدم رضاها.

مسألة ١٢ ـ لا يجوز وطء الزوجة قبل إكمال تسع سنين، دواماً كان النكاح أو منقطعاً، و أما سائر الاستمتاعات كاللمس بشهوة و الضم و التفخيذ فلا بأس بها حتى في الرضيعة، ولو وطأها قبل التسع و لم يفضها لم يترتب عليه شيء غير الاثم على الأقوى، و إن أفضاها بأن جعل مسلكي البول و الحيض واحداً أو مسلكي الحيض و الغائط واحداً حرم عليه وطؤها أبداً لكن على الأحوط في الصورة الثانية، و على أيّ حال لم تخرج عن زوجيته على الأقوى، فيجري عليها أحكامها من التوارث و حرمة الخامسة و حرمة أختها معها و غيرها، و يجب عليه نفقتها ما دامت حية و إن طلقها بل و إن تزوجت بعد الطلاق على الأحوط، بل لا يخلو من قوة، و يجب عليه دية الافضاء، وهي دية النفس، فاذا كانت حرة فلها نصف دية الرجل مضافاً إلى المهر الذي استحقته بالعقد و الدخول، ولو دخل بزوجته بعد إكمال التسع فأفضاها لم تحرم عليه و لم تثبت الدية، و لكن الاحوط الانفاق عليها ما دامت حية و إن كان الأقوى عدم الوجوب.

مسألة ١٣ ـ لا يجوز ترك وطء الزوجة أكثر من أربعة أشهر إلا باذنها حتى المنقطعة على الأقوى، و يختص الحكم بصورة عدم العذر، و أما معه فيجوز الترك مطلقا مادام وجود العذر، كما إذا خيف الضرر عليه أو عليها و من العذر عدم الميل المانع عن انتشار العضو، و هل يختص الحكم بالحاضر فلا بأس على المسافر و إن طال سفره أو يعمهما فلا يجوز للمسافر إطالة سفره أزيد من أربعة أشهر بل يجب عليه مع عدم العذر الحضور لإيفاء حق زوجته؟ قولان، أظهرهما الأول، لكن بشرط كون السفر ضرورياً ولو عرفاً كسفر تجارة أو زيارة أو تحصيل علم و نحو ذلك دون ما كان لمجرد الميل و الأنس و التفرج و نحو ذلك على الأحوط.

مسألة ١٤ ـ لا إشكال في جواز العزل، و هو إخراج الآلة عند الانزال و إفراغ المني إلى الخارج في غير الزوجة الدائمة الحرة، و كذا فيها مع إذنها، و أما فيها بدون

Problem # 11. According to the stronger and prevalent opinion, there is permission for having intercourse with the wife in the unnatural way, (i.e., from her backside), with strong reluctance. According to the more cautious opinion, it is better to give up such practice, particularly in case she does not agree (with such act).

Problem # 12. Intercourse with a woman is not allowed unless she attains the age of nine years, regardless whether the marriage is permanent or temporary. There is, however, no objection in other enjoyments like touching lasciviously, hugging and rubbing the thighs, even with a suckling infant. If a person has had intercourse with a girl before she has attained the age of nine years, but it has not resulted in *Ifḍā'*, he shall not be subjected to any punishment, except that he shall be considered to have committed a sin. If his intercourse has resulted in *Ifḍā'*, so that the urinal and menstrual or the menstrual and fecal passages have become one, she shall be rendered perpetually prohibited to him, though, according to the more cautious opinion, it shall be so in the latter case. In any case, according to the stronger opinion, she shall not cease to be his wife. So all the laws relating to her wifehood shall apply to her like mutual inheritance, prohibition on having a fifth wife, and the prohibition for the husband to marry her sister, etc. He shall be bound to maintain her as long as she is alive, even if he divorces her, rather, according to the more cautious opinion, even if she marries another husband after the divorce by the first husband, rather it is not devoid of force, and he shall also be bound to pay the *Diyat* for *Ifḍā'* to her, and that is equal to the *Diyat* of a human being. If the wife is a free woman, she shall receive half the *Diyat* of a man in addition to the dower to which she is entitled by virtue of the contract and consummation of marriage. If the husband performs intercourse with his wife after she has completed nine years of age, and it results in *Ifḍā'*, she shall neither be rendered unlawful to him, nor shall he be required to pay her *Diyat*. but, according to the more cautious opinion, he shall be bound to maintain her as long as she is alive, though, according to the stronger opinion, he is not bound to do so.

Problem # 13. The husband is not allowed to give up intercourse with his wife for more than four months, except with her permission, even if she is a temporary wife, according to the stronger opinion. This law is exclusively applicable in case there is no excuse with the husband. In case there is some excuse, he may give up intercourse with the wife indefinitely as long as the excuse exists, as when thee is a fear of harm to him or her. The excuse also includes the absence of desire for intercourse that is an impediment in the erection of the male organ. Whether the law applies exclusively to husband who is not away, and there is no objection for a husband on journey even his journey become long, or it is applicable to both, so that the husband is not allowed to prolong his journey to more than four months: rather, he is bound to fulfil his duty to his wife, thee are two opinions on this question, the more evident being in favour of the first, but with the condition that the journey must be essential, even if by usual custom, as a journey for trade, pilgrimage, education or the like, and not for mere inclination, desire, relaxation, or the like, according to the more cautious opinion.

Problem # 14. There is no objection in the permissibility of *'Azl*, and that means taking out the male organ from the female organ at the time of ejaculation, and discharge of semen outside the female

إذنها ففيه قولان، أشهرهما الجواز مع الكراهة و هو الأقوى، بل لا يبعد عدم الكراهة في التي علم أنها لا تلد، و في المسنة و السليطة و البذية و التي لا ترضع ولدها، كما أن الأقوى عدم وجوب دية النطفة عليه و إن قلنا بالحرمة، و قيل بوجوبها عليه للزوجة، وهي عشرة دنانير، و هو ضعيف في الغاية.

مسألة ١٥ ـ يجوز لكل من الزوج و الزوجة النظر الى جسد الآخر ظاهره و باطنه حتى العورة، و كذا مس كل منهما بكل عضو منه كل عضو من الآخر مع التلذذ و بدونه.

مسألة ١٦ ـ لا إشكال في جواز نظر الرجل إلى ما عدا العورة من مماثله شيخاً كان المنظور إليه أو شاباً حسن الصورة أو قبيحها ما لم يكن بتلذذ و ريبة، والعورة هي القبل و الدبر و البيضتان، و كذا لا إشكال في جواز نظر المرأة إلى ما عدا العورة من مماثلها، و أما عورتها فيحرم أن تنظر إليها كالرجل.

مسألة ١٧ ـ يجوز للرجل أن ينظر إلى جسد محارمه ما عدا العورة إذا لم يكن مع تلذذ و ريبة، و المراد بالمحارم من يحرم عليه نكاحهن من جهة النسب أو الرضاع أو المصاهرة، و كذا يجوز لهن النظر إلى ما عدا العورة من جسده بدون تلذذ و ريبة.

مسألة ١٨ ـ لا إشكال في عدم جواز نظر الرجل إلى ما عدا الوجه و الكفين من المرأة الأجنبية من شعرها و سائر جسدها، سواء كان فيه تلذذ و ريبة أم لا، و كذا الوجه و الكفان إذا كان بتلذذ و ريبة، و أما بدونها ففيه قولان بل أقوال: الجواز مطلقا، و عدمه مطلقا، و التفصيل بين نظرة واحدة فالأول، و تكرار النظر فالثاني، و أحوط الأقوال أوسطها.

مسألة ١٩ ـ لا يجوز للمرأة النظر الى الأجنبي كالعكس، و الأقرب استثناء الوجه و الكفين.

مسألة ٢٠ ـ كل من يحرم النظر اليه يحرم مسّه، فلا يجوز مس الأجنبي الأجنبية و بالعكس، بل لو قلنا بجواز النظر إلى الوجه والكفين من الأجنبية لم

organ [*extrahere ante emissionem seminis*] in case of a wife other than a permanent and free wife. Likewise, it is also allowed in her case, but with her permission. As regards the performance of '*Azl* with a permanent and free wife without her permission, there are two opinions, the more prevalent being in favour of its permissibility though with an amount of reluctance, and that is a stronger opinion; rather, even without reluctance in case of a wife about whom he knows that she cannot beget, or in case of an old woman, or one having a vicious tongue or who is foul of language or one who does not suckle her child, as also, according to the stronger opinion, he is not bound to pay *Diyat* for the loss of sperm, although we may have declared it to be forbidden. Some jurists are of the opinion that the husband is bound to pay the *Diyat* to his wife, and that is ten Dīnārs, but it is an extremely weak opinion.

Problem # 15. The husband and wife are allowed to look t the bodies of each other outwardly and inwardly including even their private parts. Likewise they are allowed to touch all parts of each other's bodies for pleasure or otherwise.

Problem # 16. There is no objection for a man to look at the body of another man like him, except his private parts, regardless whether the latter is of old or young age, handsome or ugly, as long it is not lascivious and suspicious. The private parts include the front and the back (the male organ and the anus) and both testicles. Likewise, there is no objection for a woman to look at the body of another woman like her except her private parts. As regards looking at her private parts it is forbidden as in case of a man locking at the body of another man.

Problem # 17. It is permissible for a man to look at the body of his close female relatives of prohibited degrees (*Maḥārim*) except their private parts, if it is not for pleasure or arousing suspicion. By *Maḥārim* are meant the close female relatives with whom marriage is prohibited by virtue of descent, fosterage or *Muṣāharah* (relationship created by marriage). Similarly the *Maḥārim* are allowed to look at the body of their close relative with whom their marriage is prohibited except his private parts if it is not for pleasure or arousing suspicion.

Problem # 18. There is no hesitation in the impermissibility for a man to look at a stranger woman's body besides her face and both hands like her hair and other parts of her body, whether it is for pleasure and arousing suspicion or not, and so are her face and both hands when it is for pleasure and arousing suspicion. But without pleasure and arousing suspicion, there are two opinions, rather several opinions, in favour of absolute permissibility, absolute impermissibility, and with difference in case of a single glance favouring the first opinion, and repeated glances favouring the second, and the more cautious of the opinions being the moderate one.

Problem # 19. A woman is not allowed to look at a stranger man and vice versa, the exception according to the opinion closer to the traditional authority being the face and both hands.

Problem # 20. Every person who is forbidden to look at another is also prohibited to touch that another. So it is not allowed for a stranger man to touch a stranger woman, and vice versa, even if we allow them to look at the face and both hands of a stranger woman, we cannot allow him to touch her face

نقل بجواز مسهما منها، فلا يجوز للرجل مصافحتها، نعم لا بأس بها من وراء الثوب لكن لا يغمز كفها احتياطاً.

مسألة ٢١ ـ لا يجوز النظر إلى العضو المبان من الأجنبي والأجنبية ، و الأحوط ترك النظر إلى الشعر المنفصل، نعم الظاهر أنه لا بأس بالنظر الى السن و الظفر المنفصلين.

مسألة ٢٢ ـ يستثنى من حرمة النظر و اللمس في الأجنبي و الأجنية مقام المعالجة إذا لم يمكن بالمماثل كمعرفة النبض إذا لم تمكن بآلة نحو الدرجة و غيرها، و الفصد و الحجامة و جبر الكسر و نحو ذلك و مقام الضرورة، كما إذا توقف استنقاذه من الغرق أو الحرق على النظر و اللمس، و إذا اقتضت الضرورة أو توقف العلاج على النظر دون اللمس أو العكس اقتصر على ما اضطر إليه، و فيمايضطر اليه اقتصر على مقدار الضرورة، فلا يجوز الآخر و لا التعدي.

مسألة ٢٣ ـ كما يحرم على الرجل النظر إلى الأجنبية يجب عليها التستّر من الأجانب، و لا يجب على الرجال التستر و إن كان يحرم على النساء النظر اليهم عدا ما استثني، و اذا علموا بأن النساء يتعمدن النظر اليهم فالأحوط التستر منهن و إن كان الأقوى عدم وجوبه.

مسألة ٢٤ ـ لا إشكال في أن غير المميز من الصبي و الصبية خارج عن أحكام النظر و اللمس بغير شهوة، لا معها لو فرض ثورانها.

مسألة ٢٥ ـ يجوز للرجل أن ينظر إلى الصبية ما لم تبلغ إذا لم يكن فيه تلذذ وشهوة،نعم الأحوط الأولى الاقتصار على مواضع لم تجر العادة على سترها بالألبسة المتعارفة مثل الوجه و الكفين و شعر الرأس و الذراعين و القدمين لا مثل الفخذين و الاليين و الظهر و الصدر والثديين، ولا ينبغي ترك الاحتياط فيها، و الأحوط عدم تقبيلها و عدم وضعها في حجره إذا بلغت ست سنين.

مسألة ٢٦ ـ يجوز للمرأة النظر الى الصبي المميز ما لم يبلغ، و لا يجب عليها التستر عنه ما لم يبلغ مبلغاً يترتب على النظر منه أو إليه ثوران الشهوة على الأقوى

and both hands. So a stranger man is not allowed to shake hands with her. Of course, there is no objection if the hands are covered with a cloth, but to be cautious he must not press her hand.

Problem # 21. A person is not allowed to look at the separated parts of body of a stranger man or woman. It is more cautious to avoid looking at their separated hair.

Of course, there is no objection in looking at separated teeth and nails.

Problem # 22. There is exception to the prohibition on sight or touch by stranger man or woman when it is for the purpose of treatment, in case it is not possible to be done by a person of similar sex, as testing the pulse, when it is not possible to perform it by means of an implement like a thermometer, etc., or phlebotomy, cupping,, reduction of a broken bone, or the like, and in emergency cases, as in a drowning or burning case the safety of the victim depends solely on sight or touch, but when the necessity is over, or the treatment depends on sight without touch , or otherwise, it must be confined to what is essential , and even in case of what is essential one must confine to the extent it is essential. So it is not allowed to look or touch at another occasion or cross the due limits.

Problem # 23. As it is forbidden for men to look at a stranger woman, a woman is also bound to hide herself from the stranger men. But men are not bound to hide themselves, though it is forbidden for women to look at them but in exceptional cases.

If it is known that women are deliberately looking at them, it would be more cautious for men to hide themselves, though, according to the stronger opinion, they are not bound to do so.

Problem # 24. There is no objection in excluding indiscreet male and female children from the application of the laws relating to sight and touch without lust ,but not with it if there is risk of excitement.

Problem # 25. A man may look at an immature girl if thee is no pleasure or lust in it. Of course, according to the better and cautious opinion, one must confine to the parts that are not usually covered by garments as the face, both hands, hair of the head, both arms and feet, but not both thighs, both hips, back, chest, and breasts. In her case caution must not be given up, as, to be more cautious when the girl has attained six years, she must not be kissed nor should she be taken into one's lap.

Problem # 26. A woman is allowed to look at an indiscreet boy who has not attained maturity, and she is not bound to hide herself from him if he has not reached a stage when she sets aside her eyes from him or when a glance at him may give rise to instant lust, according to the stronger opinion. In other cases, caution must be observed.

في الترتب الفعلي و على الاحوط في غيره.

مسألة ٢٧ ـ يجوز النظر إلى نساء أهل الذمة بل مطلق الكفار مع عدم التلذذ و الريبة أعني خوف الوقوع في الحرام، و الأحوط الاقتصار على المواضع التي جرت عادتهن على عدم التستر عنها، و قد تلحق بهن نساء أهل البوادي و القرى من الأعراب و غيرهم اللاتي جرت عادتهن على عدم التستر و إذا نهين لا ينتهين، و هو مشكل، نعم الظاهر أنه يجوز التردد في القرى و الأسواق و مواقع تردد تلك النسوة و مجامعهن و محالّ معاملتهن مع العلم عادة بوقوع النظر عليهن، و لا يجب غض البصر في تلك المحالّ إذا لم يكن خوف افتتان.

مسألة ٢٨ ـ يجوز لمن يريد تزويج امرأة أن ينظر إليها بشرط أن لا يكون بقصد التلذذ و إن علم أنه يحصل بسبب النظر قهراً، و بشرط أن يحتمل حصول زيادة بصيرة بها، و بشرط أن يجوز تزويجها فعلاً لا مثل ذات البعل و العدة، و بشرط أن يحتمل حصول التوافق على التزويج دون من علم أنها ترد خطبتها، و الأحوط الاقتصار على وجهها و كفيها و شعرها و محاسنها و إن كان الأقوى جواز التعدي إلى المعاصم بل و سائر الجسد ما عدا العورة، و الأحوط أن يكون من وراء الثوب الرقيق، كما أن الأحوط لو لم يكن الأقوى الاقتصار على ما إذا كان قاصداً لتزويج المنظورة بالخصوص فلا يعم الحكم ما إذا كان قاصداً لمطلق التزويج و كان بصدد تعيين الزوجة بهذا الاختبار، و يجوز تكرار النظر إذا لم يحصل الاطلاع عليها بالنظرة الأولى.

مسألة ٢٩ ـ الأقوى جواز سماع صوت الأجنبية ما لم يكن تلذذ و ريبة، و كذا يجوز لها إسماع صوتها للأجانب إذا لم يكن خوف فتنة و إن كان الأحوط الترك في غير مقام الضرورة خصوصاً في الشابة، و ذهب جماعة إلى حرمة السماع و الاسماع، و هو ضعيف، نعم يحرم عليها المكالمة مع الرجال بكيفية مهيجة بترقيق القول و تليين الكلام و تحسين الصوت فيطمع الذي في قلبه مرض.

Problem # 27. Looking at the *Dhimmī* women , rather generally all the infidel women is allowed without seeking pleasure or arising suspicion, that means when there is no risk of falling into the forbidden limit. To be more cautious one must confine oneself at looking at their parts that they usually do not hide. To them are affiliated women of the deserts and villages from among the Bedouins and others who are not accustomed to hide themselves, and when they are bade to avoid this practice, they not yield. But there is hesitation in accepting this rule. Of course, apparently it is permissible to move in the villages, markets and places where such women also move, assemble or have their commercial transactions, despite the knowledge that it is usual to look at them, and one is not bound to lower one's eyes in such places if there is no fear of any temptation.

Problem # 28. A man who intends to marry a woman is allowed to look at her on the condition that it must not be with the purpose of getting pleasure, even if he knows that looking at her will necessarily give pleasure and on the condition that thee is likelihood that it will give insight into understanding her, and that it is permissible to marry her immediately, not like one having a husband and observing *'Iddah* and also if there is likelihood of mutual agreement on the marriage without the case when he knows that she shall reject his proposal.

To be more cautious he must confine himself to look at her face, both hands, hair and good qualities, though, according to the stronger opinion, the permission may extend to her arms, rather the whole body except the private parts.

It is more cautious to see her from behind a thing cloth, as it is also more cautious though not according to the stronger opinion that it should be confined particularly to the woman whom he intends to marry, and the rule is not generalised when he intends to marry a woman and is intending to determine the woman though obtaining such information.

It is permissible to look at her again if he could not obtain the required information about her by the first sight.

Problem # 29. According to the stronger opinion, it is permissible to listen to the voice of a stranger woman if it is not meant for seeking pleasure or arousing suspicion. Likewise, a woman is allowed to let her voice be heard by stranger men, when there is not fear of any temptation, though it would be more cautious to avoid it except when specially needed particularly when the woman is young.

A group of jurists have favoured prohibition of hearing or letting others hear a woman's voice, but this opinion is weak.

Of course, it is forbidden for a woman to talk to men in an exciting way by making her voice tender, her speech soft and her voice attractive so that it may create greed in the heart of one who is (mentally) sick.

فصل في عقد النكاح وأحكامه

النكاح على قسمين: دائم ومنقطع، و كل منهما يحتاج إلى عقد مشتمل على إيجاب و قبول لفظيين دالين على إنشاء المعنى المقصود و الرضا به دلالة معتبرة عند أهل المحاورة، فلا يكفي مجرد الرضا القلبي من الطرفين و لا المعاطاة الجارية في غالب المعاملات و لا الكتابة، وكذا الاشارة المفهمة في غير الأخرس، والأحوط لزوماً كونه فيهما باللفظ العربي، فلا يجزي غيره من سائر اللغات إلا مع العجز عنه ولو بتوكيل الغير، و إن كان الأقوى عدم وجوب التوكيل، و يجوز بغير العربي مع العجز عنه، و عند ذلك لا بأس بايقاعه بغيره لكن بعبارة يكون مفادها مفاد اللفظ العربي بحيث تعد ترجمته.

مسألة ١ ـ الأحوط لو لم يكن الأقوى أن يكون الايجاب من طرف الزوجة و القبول من طرف الزوج، فلا يجزي أن يقول الزوج: «زوجتك نفسي» فتقول الزوجة: «قبلت» على الأحوط، و كذا الأحوط تقديم الأول على الثاني و إن كان الأظهر جواز العكس إذا لم يكن القبول بلفظ «قبلت» و أشباهه.

مسألة ٢ ـ الأحوط أن يكون الايجاب في النكاح الدائم بلفظي «أنكحت» أو «زوجت» فلا يوقع بلفظ «متعت» على الأحوط و إن كان الأقوى وقوعه به مع الا تيان بما يجعله ظاهراً في الدوام، و لا يوقع بمثل «بعت» أو «وهبت» أو «ملكت» أو «آجرت» و أن يكون القبول بلفظ «قبلت» أو «رضيت» و يجوز الاقتصار في القبول بذكر «قبلت» فقط بعد الايجاب من دون ذكر المتعلقات التي ذكرت فيه، فلو قال الموجب الوكيل عن الزوجة للزوج: «أنكحتك موكلتي فلانة على المهر الفلاني» فقال الزوج: «قبلت» من دون أن يقول: «قبلت النكاح لنفسي على المهر الفلاني» صح.

مسألة ٣ ـ يتعدى كل من الانكاح و التزويج إلى مفعولين، و الأولى أن

Chapter One - Contract of Marriage and its Laws

There are two kinds of Marriage: Permanent and Temporary. Each of these kinds requires a contract comprising Declaration (*Ījāb*) and Acceptance (*Qbūl*) in words carrying the sense of initiation (*Inshā'*) of the intended meaning and consent with it according to the persons speaking that language. Mere tacit consent in the heart of both the parties is not sufficient, nor *Mu'āṭāṭ* (Mutual free gift) as current in most of the transactions, nor mere writing, as also understood signs in case other than a deaf person. To be more cautious both Declaration and Acceptance must be in Arabic. It is not permissible to express them in other languages except in case of inability to express them in Arabic or appoint another as one's agent, though, according to the stronger opinion, it is not obligatory to appoint an agent. It is permissible to express them in a language other than Arabic in case of inability to pronounce them in Arabic. In such case, there is no objection in contracting a marriage in a language other than Arabic, but it must carry the sense of the Arabic words in a way that it may be called their exact translation.

Problem # 1. According to the more cautious, if not stronger, opinion Declaration must be from the side of the wife and Acceptance from the side of the husband. It is not allowed for the husband to say: "I have given myself in marriage," and the wife to say: "I have accepted,", according to the more cautious opinion. It is also according to the more cautious opinion that Declaration must precede Acceptance, though according to the more evident opinion, it can be otherwise if Acceptance is not expressed by saying; "I have accepted", etc.

Problem # 2. According to the more cautious opinion, Declaration in a marriage must be expressed by two words, namely, "*Ankaḥtu*", or "*Zavvajtu*", and according to the more cautious opinion, it is not concluded by the use of "*Matta'tu*", though according to the stronger opinion, it is concluded with it by the use of words that indicate apparently that it is meant for permanent marriage. It is, however, not concluded by the use of words like "*Bi'tu*" (I have sold),"*Wahabtu*" (I have given as a free gift), "*Mallaktu*" (I have transferred the ownership), or "*Ājartu*"(I have given on lease), and Acceptance must be expressed by: "*Qabiltu*" (I have accepted) or "*Raḍītu*" (I have consented). It is permissible in Acceptance to confine to the words: "*Qabiltu*" (I have accepted) only after the Declaration without adding the accessory words mentioned in the Declaration. So if the agent of the wife says to the husband: "*Ankaḥtuka muwakkilatī fulānata 'ala al-mahri al-fulānī*" (I have given in marriage to you my client such and such against so much dower), and the husband says: "*Qabiltu*", without saying: "*Qabiltu al-nikāḥa li-nafsī 'ala al-mahri al-fulānī*" (I have accepted the marriage for myself against so much dower", it would be a valid contract.

Problem # 3. In the words "*Inkāḥ*" and "*Tazvīj*" two objects have been used. It is better to bring the husband first and the wife in the second place, though vice versa is also permissible. They sometimes

يجعل الزوج مفعولاً أولاً و الزوجة ثانياً، و يجوز العكس، و يشتركان في أن كلاً منهما يتعديان إلى المفعول الثاني بنفسه تارة و بواسطة «من» أخرى فيقال: أنكحت أو زوجت زيداً هنداً أو أنكحت هنداً من زيد، و باللام أيضاً، هذا بحسب المشهور و المأنوس، و ربما يستعملان على غير ذلك ، و هو ليس بمشهور ومأنوس.

مسألة ٤ ـ عقد النكاح قد يقع بين الزوج و الزوجة و بمباشرتهما، فبعد التقاول و التواطؤ و تعيين المهر تقول الزوجة مخاطبة للزوج: «أنكحتك نفسي أو أنكحت نفسي منك ـ أو لك ـ على المهر المعلوم» فيقول الزوج بغير فصل معتد به: «قبلت النكاح لنفسي على المهر المعلوم ـ أو هكذا ـ» أو تقول: «زوجتك نفسي ـ أو زوجت نفسي منك أو لك ـ على المهر المعلوم» فيقول: «قبلت التزويج لنفسي على المهر المعلوم ـ أو هكذا ـ» وقد يقع بين وكيليهما، فبعد التقاول و تعيين الموكلين و المهر يقول وكيل الزوجة مخاطباً لوكيل الزوج: «أنكحت موكلك فلاناً موكلتي فلانة ـ أو من موكلك أو لموكلك فلان ـ على المهر المعلوم» فيقول وكيل الزوج: «قبلت النكاح لموكلي على المهر المعلوم ـ أو هكذا ـ» أو يقول وكيلها: «زوجت موكلتي موكلك ـ أو من موكلك أو لموكلك فلان ـ على المهر المعلوم» فيقول وكيله : «قبلت التزويج لموكلي على المهر المعلوم ـ أو هكذا ـ» و قد يقع بين وليهما كالأب و الجد، فبعد التقاول و تعيين المولىّ عليهما و المهر يقول ولي الزوجة: «أنكحت ابنتي أو ابنة ابني فلانة مثلاً ابنك أو ابن ابنك فلاناً أو من ابنك أو ابن ابنك أو لابنك أو لابن ابنك على المهر المعلوم» أو يقول: «زوجت بنتي ابنك مثلاً أو من ابنك أو لابنك» فيقول ولي الزوج: «قبلت النكاح أو التزويج لابني أو لابن ابني على المهر المعلوم» و قد يكون بالاختلاف بأن يقع بين الزوجة و وكيل الزوج و بالعكس، أو بينها و بين ولي الزوج و بالعكس أو بين وكيل الزوجة و ولي الزوج و بالعكس، و يعرف كيفية إيقاع العقد في هذه الصور مما فصلناه في الصور المتقدمة، و الأولى تقديم الزوج على الزوجة في جميع الموارد كما مرّ.

participate directly with the second object in the use of the transitive verb and sometimes indirectly by the use of the word "*min*". So It is said: "*Ankaḥtu* or *Zavvajtu Zaydan*
Hindan ," or "*Ankaḥtu Hindan min Zaydin,*" (I have married Hind to Zayd), and sometime with the addition of "*alif lām*" to the name of the husband. This is according to the famous and prevalent use, but it is also used in other ways, but they are not famous and prevalent.

Problem # 4. A contract of marriage is concluded between husband and wife even personally. So after the preliminary talks and discussion and determination of the amount of dower, the wife may say addressing the husband: "*Ankaḥtuka nafsī*, or *Ankaḥtu nafsī minka*, or *laka 'la al-mahri al-ma'lūm.*" (I have married myself to you against the specified dower), and the husband says without considerable delay: "Qabiltu al-nikāḥa li-nafsī 'ala al-mahri al-ma'lūm," (I have accepted the marriage for myself against the specified dower), or the like. Or the wife may say: "*Zavvajtuka nafsī*, or "*Zavvajtu nafsī minka*, or *laka 'ala al-mahri al-ma'lūm*" (Same as above), and the husband says: "Qabiltu al-tazvija li-nafsī 'la al-mahri al-ma'lūm," (Same as above), or the like.

A marriage contract may also be concluded through the agents of husband and wife. So after the discussion and determination of the clients and dower, the wife's agent addressing the husband's agent says: "*Ankaḥtu muwakkilaka fulānan muwakkilatī fulānatan* or *min muvakkilaka* or *li-muvakkilaka fulanin 'ala al-mahri al-ma'lūm* (I have married my client such and such to your client such and such against the specified dower).The husband's agent in reply says: "*Qabiltu al-nikāḥa li-muwakkilī 'ala al-mahri al-ma'lūm* ." Or the wife's agen says: "*Zavvajtu muvakkilatī m,uwakkilaka* ,or "*min muvakkilak*" or "*li- muvakkilka fulānin 'ala al-mahr al- -ma'lūm,*" and in reply his agent says:"*Qabiltu al-tazvīja li-muvakkilī 'ala al-mahri al-ma'lūm*", or the like.

It may be contracted by their guardians like father or grandfather. So after their discussion and determination of the wards and dower, the wife's guardian says; "*Ankaḥtu ibnatī* or "*ibnata ibnī fulānatan mathalan ibnaka*" or "*ibna ibnika fulānan*" or "*min ibnika" or "min ibni ibnika*" or " *li-ibnika*" or "*li-ibni ibnika 'ala al-mahri al-ma'lūm*".(I have married my daughter or grand-daughter such and such, suppose, to your son or grandson against specified dower) or he says: "*Zavvajtu binī ibnaka*" or "*min ibnika*" or "*li-ibnika.....*". The husband's guardian in reply says: "*Qabiltu al-nikāḥa*" or "*al-tazvīja li-ibnī*" or "*li-ibni ibnī 'ala al-mahri al-ma'lūm,*" (I have accepted the marriage for my son or grandson against the specified dower).

It may be contracted with difference, so that it may be between the wife and the husband's agent, or vice versa, or between her and the husband's guardian, or vice versa, or between the wife's agent and the husband's guardian, or vice versa.

The details of the method of contracting marriage in such cases may be understood from what we have mentioned in the previous cases. It is better that the husband should precede the wife in all cases, as we have already mentioned.

Problem # 5. It is not a condition that the words used in Acceptance should correspond with those used

مسألة ٥ ـ لا يشترط في لفظ القبول مطابقته لعبارة الايجاب، بل يصح الايجاب بلفظ و القبول بلفظ آخر، فلو قال: «زوجتك» فقال: «قبلت النكاح» أو قال: «أنكحتك» فقال: «قبلت التزويج» صح و إن كان الأحوط المطابقة.

مسألة ٦ ـ إذا لحن في الصيغة فإن كان مغيّراً للمعنى بحيث يعد اللفظ عبارة لمعنى آخر غير ما هو المقصود لم يكف، و إن لم يكن مغيّراً بل كان بحيث يفهم منه المعنى المقصود و يعد لفظاً لهذا المعنى إلا أنه يقال له لفظ ملحون و عبارة ملحونة من حيث المادة أو من جهة الاعراب والحركات فالاكتفاء به لا يخلو من قوة و إن كان الأحوط خلافه، و أولى بالاكتفاء اللغات المحرفة عن اللغة العربية الأصلية، كلغة سواد العراق في هذا الزمان إذا كان المباشر للعقد من أهالي تلك اللغة، لكن بشرط أن لا يكون مغيّراً للمعنى مثل جوزت بدل زوجت إلا إذا فرض صيرورته في لغتهم كالمنقول.

مسألة ٧ ـ يعتبر في العقد القصد إلى مضمونه، و هو متوقف على فهم معنى لفظي «أنكحت» و «زوجت» ولو بنحو الاجمال حتى لا يكون مجرد لقلقة لسان، نعم لا يعتبر العلم بالقواعد العربية و لا العلم و الاحاطة بخصوصيات معنى اللفظين على التفصيل، بل يكفي علمه إجمالاً، فاذا كان الموجب بقوله «أنكحت» أو «زوجت» قاصداً لايقاع العلقة الخاصة المعروفة المرتكزة في الأذهان التي يطلق عليها النكاح و الزواج في لغة العرب و يعبر عنها في لغات أخر بعبارات أخر وكان القابل قابلاً لهذا المعنى كفى إلا إذا كان جاهلاً باللغات بحيث لا يفهم أن العلقة واقعة بلفظ «زوجت» أو بلفظ «موكلي» فحينئذ صحته مشكلة و إن علم أن هذه الجملة لهذا المعنى.

مسألة ٨ ـ يعتبر في العقد قصد الانشاء بأن يكون الموجب في قوله: «أنكحت» أو «زوجت» قاصداً إيقاع النكاح و الزواج و الايجاد ما لم يكن لا الاخبار و الحكاية عن وقوع شيء في الخارج، والقابل بقوله: «قبلت» منشئاً

in Declaration. Rather it is valid if the Declaration is expressed certain words and Acceptance in some other words. So if in the Declaration one says: "*Zavvajtuka*", in Acceptance one says in reply: "*Qabiltu al-nikāḥa,*" or if in Declaration one says: "*Ankaḥtuka,*" in Acceptance one says: "*Qabiltu al-tazvīja,*" it would be a valid contract, although according to the more cautious opinion, there should be correspondence (between Declaration and Acceptance).

Problem # 6. If some grammatical mistake takes place in pronouncing the *Ṣīghah* (prescribed form), then if it changes the meanings in a way that the word may carry meanings other than intended, it shall not be sufficient. If, however, it does not change it in a way that the intended meanings are understood from it and conveys the word in such meaning, except that it may be called having grammatical mistake and a sentence containing grammatical mistake as regards its root, or vowel sounds or their movements, then it is not devoid of force to suffice with it, though contrary to it shall be more cautious.

It is better to suffice with the words tampered with from the original Arabic language, as the slang of the modern Iraq if it relates to the contract of those speaking that slang, provided it does not change its meanings as "*Javvaztu*" intead of 'Zavvajtu", except when it is used to mean "*Zavvajtu.*

Problem # 7. It is a condition in the contract of marriage that the person pronouncing it must intend the words he is using that depends on understanding the meanings of the two words, namely, "*Ankaḥtu* " and "*Zavvajtu*", even if briefly, so that it may not be mere babbling the tongue . It is not a condition that the person must know the Arabic grammar, nor that he should have knowledge or command over the detailed meanings of the two words; rather a brief knowledge of it shall be sufficient.

If the person pronouncing the Declaration while saying "*Ankaḥtu*" or "*Zavvajtu*" should mean the special connection that is well-known and existing in the minds carrying the sense of *Nikāḥ* and *Zivāj* in the language of the Arabs that may be conveyed in other words in other languages, and the person expressing Acceptance should also take it in the same meaning, it shall be sufficient, except when he is ignorant of the language so that he does not know that these words create the connection by the word : "*Zavvajtu*" or the word: "*Muvakkilī*" (my client) , in which case there is hesitation in the validity of the contract, even if he knows that the sentence carries these meanings.

Problem # 8. It is also a condition in the marriage contract that the person pronouncing it must mean initiation (*Inshā'*), so that the person expressing Declaration, by saying "*Ankaḥtu*" or "*Zavvajtu*" must mean the conclusion of *Nikāḥ* or *Zivāj* and initiation of what was not there , and not mere information or narration about the happening of a thing externally, and the person expressing Acceptance, by saying "*Qabitu*" must mean initiation of Acceptance of what has been concluded by the person expressing Declaration.

Problem # 9. It is a condition that there must be uninterrupted sequence and no considerable delay

لقبول ما أوقعه الموجب.

مسألة ٩ ـ تعتبر الموالاة و عدم الفصل المعتد به بين الايجاب و القبول.

مسألة ١٠ ـ يشترط في صحة العقد التنجيز، فلو علّقه على شرط و مجيء زمان بطل، نعم لو علّقه على أمر محقق الحصول كما إذا قال في يوم الجمعة «أنكحت إن كان اليوم يوم الجمعة» لم يبعد الصحة.

مسألة ١١ ـ يشترط في العاقد المجري للصيغة البلوغ و العقل، فلا اعتبار بعقد الصبي و المجنون ولو أدوارياً حال جنونه، سواء عقدا لنفسهما أو لغيرهما، و الأحوط البناء على سقوط عبارة الصبي، لكن لو قصد المميز المعنى و عقد لغيره وكالة أو فضولاً و أجاز أو عقد لنفسه مع إذن الولي أو إجازته أو أجاز هو بعد البلوغ يتخلص بالاحتياط، و كذا يعتبر فيه القصد، فلا اعتبار بعقد الساهي و الغالط و السكران و أشباههم، نعم في خصوص عقد السكرى إذا عقبه الاجازة بعد إفاقتها لا يترك الاحتياط بتجديد العقد أو الطلاق.

مسألة ١٢ ـ يشترط في صحة العقد تعيين الزوجين على وجه يمتازان عن غيرهما بالاسم أو الاشارة أو الوصف الموجب لذلك، فلو قال: زوجتك إحدى بناتي أو قال: زوجت بنتي فلانة من أحد بنيك أو من أحد هذين بطل، نعم يشكل فيما لو كانا معينين بحسب قصد المتعاقدين و متميزين في ذهنهما لكن لم يعينا هما عند إجراء الصيغة و لم يكن ما يدل عليه من لفظ أو فعل أو قرينة خارجية، كما إذا تقاولا و تعاهدا على تزويج بنته الكبرى من ابنه الكبير و لكن في مقام إجراء الصيغة قال: «زوجت إحدى بناتي من أحد بنيك» و قبل الآخر، نعم لو تقاولا و تعاهدا على واحدة فعقدا مبنياً عليه فالظاهر الصحة، كما إذا قال بعد التقاول: «زوجت ابنتي منك» دون أن يقول: «زوجت إحدى بناتي».

مسألة ١٣ ـ لو اختلف الاسم مع الوصف أو اختلفا أو أحدهما مع الاشارة يتبع العقد لما هو المقصود و يلغى ما وقع غلطاً و خطأ، فاذا كان المقصود تزويج البنت الكبرى و تخيل أن اسمها فاطمة و كانت المسماة بفاطمة هي الصغرى و

between Declaration and Acceptance.

Problem # 10. It is a condition for the validity of the marriage contract that it must not be contingent. If it is made contingent of some condition or approach of time, it shall be void. Of course, if a person has made it contingent on something that has already been achieved, as when he says: "I have given in marriage if the day is Friday", it shall not be far from being valid.

Problem # 11. It is a condition the person pronouncing the *Ṣīghah* must be adult and sane, so that if it is expressed by a child or one labouring under insanity, although periodical, but expressed in the state of insanity, whether they express it for themselves or for others, it shall have no legal effect. To be more cautious, the words expressed by a child must be considered having no legal value. If, however, a discreet child intends the meaning expressed by him and expresses the *Ṣīghah* for someone else as an authorized agent, or an unauthorized agent but later endorsed by the party concerned, or for himself with the consent of his guardian or his permission or when he has given permission after attaining maturity, it shall be declared valid with caution.

Likewise, intention is also a condition in it. Therefore there is no legal value of a contract concluded by one labouring under some error, mistake, intoxication, or the like. Of course, in case of a contract concluded by an intoxicated person, if it is followed by his consent after coming to senses, caution must not be given up by renewing the contract or divorcing her.

Problem # 12. It is a condition in a marriage contract that both the husband and wife must be so specified that they may be distinguished from others by name, signs, or qualification leading to the purpose. If a person says: "I have married one of my daughters," or "I have married my daughter such and such to one of your sons," or "one of these," it shall be invalid. Of course, there shall be hesitation in the validity of the contract if both the parties were specified according to the intention of the two contracting parties and distinct in their minds , but were not specified at the time of pronouncing the *Sīghah* , but there is nothing like the words, or deeds or external circumstances indicating it, as when both the contracting parties have held detailed discussion and have agreed on the marriage of the elder daughter with the elder son, but at the time of pronouncing the *Sīghah*, the daughter's father says: "I have married one of my daughters to one of your sons", and the husband's father accepts it.

If, however, both the contracting parties held discussion and agree on one thing and they conclude the contract on that basis, then apparently it shall be a valid contract, as when the daughter's father after discussion says: "I have married my daughter to you," instead of saying: "I have married one of my daughters."

Problem # 13. If there is a difference of name with the description, or both or one of the name and description differ with the sign the contract shall follow what is actually intended, and what has been the result of error or mistake shall be cancelled. So if the intention was the marriage of the elder daughter.

كانت الكبرى مسماة بخديجة و قال: «زوجتك الكبرى من بناتي فاطمة» و قع العقد على الكبرى التي اسمها خديجة و يلغى تسميتها بفاطمة و إن كان المقصود تزو يج فاطمة و تخيل أنها كبرى فتبين أنها صغرى وقع العقد على المسماة بفاطمة و ألغي وصفها بأنها الكبرى، و كذا لو كان المقصود تزو يج المرأة الحاضرة و تخيل أنها كبرى و اسمها فاطمة فقال: «زوجتك هذه و هي فاطمة و هي الكبرى من بناتي» فتبين أنها الصغرى و اسمها خديجة وقع العقد على المشار اليها و يلغى الاسم و الوصف، ولو كان المقصود العقد على الكبرى فلما تخيل أن هذه المرأة الحاضرة هي تلك الكبرى قال: «زوجتك هذه و هي الكبرى» لا يقع العقد على الكبرى بلا إشكال، و في وقوعه على المشار إليها وجه لكن لا يترك الاحتياط بتجديد العقد أو الطلاق.

مسألة ١٤ ـ لا إشكال في صحة التوكيل في النكاح من طرف واحد أو من طرفين بتوكيل الزوج أو الزوجة إن كانا كاملين أو بتوكيل وليهما إن كانا قاصرين. و يجب على الوكيل أن لا يتعدى عما عيّنه الموكل من حيث الشخص والمهر و سائر الخصوصيات. فان تعدى كان فضولياً موقوفاً على الاجازة، و كذا يجب عليه مراعاة مصلحة الموكل، فان تعدى و أتى بما هو خلاف المصلحة كان فضولياً، نعم لو عين خصوصية تعينت و نفذ عمل الوكيل و إن كان ذلك على خلاف مصلحة الموكل.

مسألة ١٥ ـ لو وكلت المرأة رجلاً في تزويجها ليس له أن يزوجها من نفسه إلا إذا صرحت بالتعميم أو كان كلامها بحسب متفاهم العرف ظاهراً في العموم بحيث يشمل نفسه.

مسألة ١٦ ـ الأقوى جواز تولي شخص واحد طرفي العقد بأن يكون موجباً و قابلاً من الطرفين أصالة من طرف و وكالة من آخر، أو ولاية من الطرفين أو وكالة عنهما او بالاختلاف و إن كان الأحوط الأولى مع الامكان تولي الاثنين و عدم تولي شخص واحد للطرفين خصوصاً في تولي الزوج طرفي العقد أصالة من

and her father thought that she was named Fāṭimah, while Fāṭimah was the name of the younger daughter, the elder daughter was named Khadījah, and the daughter's father says: "I have married you to the elder of my daughrters Fāṭimah," the elder daughter whose name is Khadījah shall be contracted in marriage, and naming her as Fāṭimah shall be cancelled. If Fāṭimah was intended to be married, and her father thought that she was the elder and it transpired that she was the younger one, the daughter named Fāṭimah shall be contracted in marriage, and her description that she was the elder one shall be cancelled. Likewise, if the present daughter was intended to be married, and her father thought that she was the elder and that her name was Fāṭimah, and so he said: "I have married this daughter who is Fāṭimah and the elder of my daughters," and it transpires that she is the younger one and her name is Khadījah, the daughter who is actually intended shall be contracted in marriage, and her name and description shall be considered ineffectual.

If the father intends to marry his elder daughter, and he thinks that the present one is the elder one, and he says: "I have married you this daughter and she is the elder one," the elder daughter shall not be contracted in marriage without any hesitation, and there is obvious intention in the conclusion of her contract, but caution must not be given up by renewing the contract or divorcing her.

Problem # 14. There is no objection in the appointment of an agent in marriage by one or both of the parties, by appointing the husband or wife as the agent if they are competent, or by appointing their guardians as agents if both of them are minor. It is obligatory on the agent not to exceed the limits imposed by the client as regards the person, dower and other particulars. If he exceeds the limits, the contract shall be one contracted by an unauthorized person and shall depend on endorsement by the party concerned.

Likewise, he is bound to observe the interest of his client. So if he oversteps and performs what is against the interest of his client, the contract shall be treated as one concluded by an unauthorized person.

Of course, if the client has specified some qualification, it shall be decisive, and the agent's act shall be effective, even if it is against the interest of the client.

Problem # 15. If a woman appoints a man as her agent in her marriage, he shall not be allowed to marry her to himself except when she has explicitly generalised or her words were such as conveying apparent generalisation as understood according to the custom.

Problem # 16. According to the stronger opinion, a single person may be authorized by both the parties to a marriage contract to pronounce Declaration and Acceptance on behalf of both the parties, acting as principal from one side and an agent from the other, as guardian from both parties or an agent of both, or differently, although to be more cautious it is better , if possible, to authorize two persons and not a

طرفه و وكالة عن الزوجة في عقد الانقطاع فانه لا يخلو من إشكال غير معتد به لكن لا ينبغي فيه ترك الاحتياط.

مسألة ١٧ - إذا وكّلا وكيلا في العقد في زمان معين لا يجوز لهما المقاربة بعد ذلك الزمان ما لم يحصل لهما العلم بايقاعه و لا يكفي الظن، نعم لو أخبر الوكيل بالايقاع كفى، لأن قوله حجة فيما و كل فيه.

مسألة ١٨ - لا يجوز اشتراط الخيار في عقد النكاح دواماً أو انقطاعاً لا للزوج و لا للزوجة، فلو شرطاه بطل الشرط، بل المشهور على بطلان العقد أيضاً، و قيل ببطلان الشرط دون العقد، و لا يخلو من قوة، و يجوز اشتراط الخيار في المهر مع تعيين المدة، فلو فسخ ذو الخيار سقط المهر المسمى، فيكون كالعقد بلا ذكر المهر، فيرجع إلى مهر المثل، هذا في العقد الدائم الذي لا يعتبر فيه ذكر المهر، و أما المتعة التي لا تصح بلا مهر فهل يصح فيها اشتراط الخيار في المهر؟ فيه إشكال.

مسألة ١٩ - إذا ادعى رجل زوجية امرأة فصدقته أو ادعت امرأة زوجية رجل فصدقها حكم لهما بذلك مع احتمال الصدق، و ليس لأحد الاعتراض عليهما من غير فرق بين كونهما بلديين معروفين أو غريبين، و أما إذا ادعى أحدهما الزوجية و أنكر الآخر فالبينة على المدعي و اليمين على من أنكر، فإن كان للمدعي بينة حكم له، و إلا فتتوجه اليمين إلى المنكر فإن حلف سقطت دعوى المدعي، و إنْ نكل يرد الحاكم اليمين على المدعي، فإن حلف ثبت الحق، و إن نكل سقط، و كذا لورده المنكر على المدعي و حلف ثبت، و ان نكل سقط،هذا بحسب موازين القضاء و قواعد الدعوى و أما بحسب الواقع فيجب على كل منهما العمل على ما هو تكليفه بينه و بين الله تعالى.

مسألة ٢٠ - إذا رجع المنكر عن إنكاره إلى الاقرار يسمع منه و يحكم بالزوجية بينهما و إن كان ذلك بعد الحلف على الأقوى.

مسألة ٢١ - إذا ادعى رجل زوجية امرأة و أنكرت فهل لها أن تتزوج من

single person, by both the parties to a marriage contract , particularly in authorizing the husband on both sides of a contract, one principally from his own side and another as agent on behalf of the wife in a temporary marriage, as it is not free from ambiguity though not considerable, but caution must not be given up in such case.

Problem # 17. If a person appoints another as his/her agent in marriage for a definite period, both the parties to the contract shall not be allowed to have sexual intercourse after the passage of that period unless they have obtained knowledge about the conclusion of the contract, and mere conjecture is not sufficient. If, however, the agent has informed them about the conclusion of the contract, it shall be sufficient, as his word is a proof for what he has been appointed.

Problem # 18. In a marriage contract a stipulation of option is not allowed, irrespective of its being permanent or temporary, neither for the husband nor for the wife. If they stipulate an option, the option shall be void, rather, according to the prevalent opinion the contract shall also be void. However, some jurists hold that the condition shall be void but not the contract, and it is not devoid of force. A stipulation of option is allowed in dower by specifying the period. If the person authorized to exercise option cancels the dower, the specified dower shall also be cancelled, and the contract shall be like one in which no dower has been specified, and so it shall revert to the proper dower. This takes place in a permanent marriage in which specification is not a condition. But as regards a temporary marriage, that is not valid without dower, whether stipulation of option for dower is valid, there is ambiguity in it.

Problem # 19. If a man claims a woman to be his wife and she also confirms it, or a woman claims to be the wife a man and he confirms it, judgement shall be given in favour of their claim in view of likelihood of truth in their claim, and no one shall be entitled to object to them without there being any difference whether they are both well-known citizens or strangers. If, however, one of them claims the matrimonial tie, and the other denies it, the claimant shall be required to adduce evidence and the one denying it shall be required to take an oath. If the claimant has evidence, judgement shall be given in his favour; otherwise, the person denying shall be required to take oath. If he/she takes oath, the claim shall be dropped. If, however, he/she refuses to take oath, the judge shall forward the oath to the claimant. If he takes oath, his right shall be established, and if he refuses to take oath, his claim shall drop. Likewise, if the person denying the claim reverts the oath to the claimant, and he takes oath, his claim shall be established, but if he refuses to take oath, his claim shall drop. This is according to the criteria of administration of justice and rules of claim. In fact, however, each of them should act according to what is his/her duty between him/her and Allāh, the Exalted.

Problem # 20. If the person denying reverts to repudiate his/her denial by acknowledging the claim, his repudiation shall be entertained, and judgement shall be given in favour of the marital tie between them, even if it were after taking oath, according to the stronger opinion.

Problem # 21. If a man claims a woman to be his wife, but she denies it, then shall she be allowed to marry another man, or shall another man be allowed to marry her before the finalisation of the case, and the issuance of the judgement in favour of invalidity of the claim of the claimant or not, there are two alternatives, the stronger being in favour of the first, particularly when the claimant delays in filing

غيره و للغير أن يتزوجها قبل فصل الدعوى و الحكم ببطلان دعوى المدعي أم لا؟ وجهان، أقواهما الأول خصوصاً فيما لو تراخى المدعي في الدعوى أو سكت عنها حتى طال الأمر عليها، و حينئذ إن أقام المدعي بعد العقد عليها بينة حكم له بها و بفساد العقد عليها، و إن لم تكن بينة تتوجه اليمين إلى المعقود عليها، فإن حلفت بقيت على زوجيتها و سقطت دعوى المدعي، و كذا لو ردت اليمين على المدعي و نكل عن اليمين، و انما الاشكال فيما إذا نكلت عن اليمين أو ردّت اليمين على المدعي و حلف، فهل يحكم بسببها بفساد العقد عليها فيفرّق بينها و بين زوجها أم لا؟ و جهان أوجههما الثاني، لكن إذا طلقها الذي عقد عليها أو مات عنها زال المانع فترد إلى المدعي بسبب حلفه المردود عليه من الحاكم أو المنكر.

مسألة ٢٢ ـ يجوز تزويج امرأة تدعي أنها خلية من الزوج مع احتمال صدقها من غير فحص حتى فيما إذا كانت ذات بعل سابقاً فادعت طلاقها أو موته، نعم لو كانت متهمة في دعواها فالأحوط الأولى الفحص عن حالها فمن غاب غيبة منقطعة لم يعلم موته و حياته إذا ادعت زوجته حصول العلم لها بموته من الأمارات و القرائن و إخبار المخبرين جاز تزويجها و إن لم يحصل العلم بقولها، و يجوز للوكيل أن يجري العقد عليها إذا لم يعلم كذبها في دعوى العلم، و لكن الأحوط الترك خصوصاً إذا كانت متهمة.

مسألة ٢٣ ـ اذا تزوج بامرأة تدعي أنها خلية عن الزوج فادعى رجل آخر زوجيتها فهذه الدعوى متوجهة إلى كل من الزوج و الزوجة، فان أقام المدعي بينة شرعية حكم له عليهما و فرق بينهما وسلمت إليه، و مع عدم البينة توجه اليمين إليهما، فإن حلفا معاً على عدم زوجيته سقطت دعواه عليهما، و إن نكلا عن اليمين فردها الحاكم عليه أو رداها عليه و حلف ثبت مدعاه، و إن حلف أحدهما دون الآخر بأن نكل عن اليمين فردها الحاكم عليه أو ردّ هو عليه فحلف سقطت دعواه بالنسبة إلى الحالف، و أما بالنسبة الى الآخر و إن ثبتت دعوى المدعي بالنسبة إليه لكن ليس لهذا الثبوت أثر بالنسبة إلى من حلف، فإن كان الحالف

his claim, or has kept quiet until the matter becomes too lengthy for her. In such case, if the claimant adduces evidence in favour of his claim, after the conclusion of her marriage contract (with another man), judgement shall be given in his favour and the contract shall be declared null and void. If, however, there is no evidence, the woman contracted in marriage shall be required to take oath, so that if she takes oath, she shall remain the wife of another man, and the claim of the claimant shall drop. The same shall be the case, if she returns the oath to the claimant, but he refuses to take oath. However, the difficulty lies in case she refuses to take oath, or the oath is reverted to the claimant and he takes oath, then whether judgement shall be given in favour of invalidation of her marriage contract and their separation between her and her husband or not. There are two opinions, the more reasonable being in favour of the second alternative. If, however, the man who has married her divorces her, or has died, thus removing the obstacle, she shall be returned to the claimant due to his oath reverted to him by the judge and the woman denying the claim.

Problem # 22. Marriage with a woman claiming to be having no husband is allowed without making any inquiry due to the likelihood of truth in her statement, even in case she had previously a husband, but she claims to have been divorced or that husband is dead. Of course, if she has previously been charged with falsehood in her claim, then it shall be more cautious to make necessary inquiry about her condition. If a man has been missing for an indefinite period and there is no knowledge about his being dead or alive, then if his wife claims to have obtained knowledge about his death by indications, circumstances or information by informers, she shall be allowed to be married, even if nothing is known about her statement, and an agent shall be allowed to pronounce the *Sīghah* of her marriage if he does not know her statement to be false, though it is more cautious to avoid it, particularly when she is charged with making false statement.

Problem # 23. If a man marries a woman claiming to be having no husband, and a man claims the woman to be her wife, then it shall be a claim against both the wife and the husband. If the claimant adduces legal evidence, judgement shall be given against both of them, and they shall be separated from each other, and the woman shall be handed over to the claimant.

In absence of evidence, both the husband and wife shall be required to take oath. If both of them take oath against the claimant's marital tie with the woman, the claim of the claimant against both of them shall drop. If both of them refuse to take oath, and the judge forwards it to the claimant or they forward it to him, and he takes oath, his claim shall be established. If, however, one of them takes oath to the exclusion of the other who refuses to take oath, and the judge forwards the oath to the claimant, or he forwards it to him, and he takes oath, his claim against the one taking oath shall drop. As regards his claim against the other, if the claim of the claimant is established against him/her, but there is no effect of this establishment of the claim in relation to the one who has taken oath, then if the person taking oath is the husband, and the one refusing take oath is the wife, there shall be no effect of her

هو الزوج و الناكل هي الزوجة ليس لنكولها أثر بالنسبة إلى الزوج، إلا أنه لو طلقها أو مات عنها ردت إلى المدعي، و إن كان الحالف هي الزوجة و الناكل هو الزوج سقطت دعوى المدعي بالنسبة إليها و ليس له سبيل إليها على كل حال.

مسألة ٢٤ ـ إذا ادعت امرأة أنها خلية فتزوجها رجل ثم ادعت بعد ذلك أنها كانت ذات بعل لم تسمع دعواها، نعم لو أقامت البينة على ذلك فرّق بينهما، و يكفي في ذلك بأن تشهد بأنها كانت ذات بعل فتزوجت حين كونها كذلك من الثاني من غير لزوم تعيين زوج معين.

مسألة ٢٥ ـ يشترط في صحة العقد الاختيار أعني اختيار الزوجين، فلو أكرها أو أكره أحدهما على الزواج لم يصح، نعم لو لحقه الرضا صح على الأقوى.

فصل في أولياء العقد

مسألة ١ ـ للأب و الجد من طرف الأب بمعنى أب الأب فصاعداً ولاية على الصغير والصغيرة و المجنون المتصل جنونه بالبلوغ، و كذا المنفصل عنه على الظاهر، و لا ولاية للأم عليهم و للجد من طرف الأم ولو من قبل أمّ الأب بأن كان أباً لأمّ الأب مثلاً، و لا للأخ و العمّ والخال و أولادهم.

مسألة ٢ ـ ليس للأب والجد للأب ولاية على البالغ الرشيد، و لا على البالغة الرشيدة إذا كانت ثيبة، و أما إذا كانت بكراً ففيه أقوال: استقلالها و عدم الولاية لهما عليها لا مستقلاً و لا منضماً، و استقلالهما و عدم سلطنة و ولاية لها كذلك، و التشريك بمعنى اعتبار إذن الولي و إذنها معاً، و التفصيل بين الدوام و الانقطاع إما باستقلالها في الأول دون الثاني أو العكس و الأحوط الاستئذان منهما، نعم لا إشكال في سقوط اعتبار إذنهما إن منعاها من التزويج بمن هو كفو لها شرعاً و عرفاً مع ميلها، و كذا إذا كانا غائبين بحيث لا يمكن الاستئذان منهما

refusal in relation to the husband, except that if he divorces her or happens to die, she shall be returned to the claimant.

If, however. it is the wife who takes oath and the husband who refuses to take oath, the claim of the claimant against her shall drop, and he shall in no case have access to her.

Problem # 24. If a woman claims that she has no husband, and a man marries her. Then she claims she has a husband, no heed shall be paid to her claim. If, however, she adduces evidence in favour of her latter claim, they shall be separated from each other, and it is sufficient for the witnesses to say she had previously a husband, and she had married the second husband while still having a husband, and it is not necessary to specify the previous husband.

Problem # 25. It is also a condition in a marriage that there must be free will, i.e., free will of both the husband and wife. If someone compels either or both of them to marry, it shall not be valid marriage.

Of course, if the consent is given after the conclusion of the marriage contract, it shall be a valid marriage contract, according to the stronger opinion.

Chapter Two - Authority of Guardians to Contract Marriage of Their Ward

Problem # 1. A father and a paternal grandfather, i.e., the father's father, how high so ever, have the right of guardianship of a minor boy or girl, or a lunatic whose insanity has been uninterrupted until his attaining maturity, and so is the case apparently with a lunatic with interrupted insanity. The mother or maternal grandfather, even if related through father's mother, suppose, being the father of the father's mother have no right of guardianship of them. Nor have the brother, maternal uncle, paternal uncle or their children any such right.

Problem # 2. A father and a paternal grandfather have no right of guardianship of an adult and discreet boy or an adult and discreet girl if she is non-virgin (*Thayyibah*). If, however, is (adult and discreet, but) virgin, there are several opinions in her case, one declaring her absolutely independent with the father and paternal grandfather having no right of guardianship independently or jointly, the second declaring the father and paternal grandfather independent with the girl having no similar authority or guardianship over herself, the third being in favour of partnership of both, in the sense that there is a condition of consent of both the guardians and the girl simultaneously, the fourth makes difference between a permanent and temporary marriages, by declaring her independence in the first to the exclusion of the other, or vice versa, the more cautious being in favour of obtaining the consent of both (the guardians and the girl). Of course there is no objection in the elimination of the condition of the guardians' permission in case they forbid her to marry one who is her equal (*Kufv*), according to *Sharī'ah* and prevalent custom, along with her own willingness. The same is the case when both the guardians are away in a way that it is not possible to obtain their permission, while she needs to marry.

Problem # 3. The right of guardianship of the grandfather is not dependent on the father's life or his

مع حاجتها إلى التزويج.

مسألة ٣ ـ ولاية الجد ليست منوطة بحياة الأب و لا موته، فعند وجودهما استقل كل منهما بالولاية، و إذا مات أحدهما اختصت بالآخر، و أيهما سبق في تزويج المولىّ عليه عند وجودهما لم يبق محل للآخر، ولو زوج كل منهما من شخص فإن علم السابق منهما فهو المقدم و لغا الآخر، و إن علم التقارن قدم عقد الجد و لغا عقد الأب، و إن جهل تاريخهما فلا يعلم السبق و اللحوق و التقارن لزم إجراء حكم العلم الاجمالي بكونها زوجة لأحدهما و إن علم تاريخ أحدهما دون الآخر فان كان المعلوم تاريخ عقد الجد قدم على عقدالأب و إن كان عقد الأب قدم على عقد الجد، لكن لا ينبغي ترك الاحتياط في هذه الصورة.

مسألة ٤ ـ يشترط في صحة تزويج الأب والجد و نفوذه عدم المفسدة و إلا يكون العقد فضولياً كالأجنبي يتوقف صحته على إجازة الصغير بعد البلوغ بل الأحوط مراعاة المصلحة.

مسألة ٥ ـ إذا وقع العقد من الأب أو الجد عن الصغير أو الصغيرة مع مراعاة ما يجب مراعاته لاخيار لهما بعد بلوغهما بل هو لازم عليهما.

مسألة ٦ ـ لو زوج الولي الصغيرة بدون مهر المثل أو زوج الصغير بأزيد منه فان كانت هناك مصلحة تقتضي ذلك صح العقد و المهر و لزم، و إن كانت المصلحة في نفس التزويج دون المهر فالأقوى صحة العقد و لزومه و بطلان المهر بمعنى عدم نفوذه و توقفه على الاجازة بعد البلوغ، فان أجاز استقر، و إلا رجع إلى مهر المثل.

مسألة ٧ ـ السفيه المبذر المتصل سفهه بزمان صغره أو حجر عليه للتبذير لا يصح نكاحه إلا باذن أبيه أو جده أو الحاكم مع فقدهما، و تعيين المهر و المرأة إلى الولي، ولو تزوج بدون الاذن وقف على الاجازة، فان رأى المصلحة وأجاز جاز و لا يحتاج إلى إعادة الصيغة.

مسألة ٨ ـ إذا زوج الولي المولىّ عليه بمن له عيب لم يصح و لم ينفذ سواء كان

death. In case both of them are living, each one of them shall have right of guardianship independently. If either of them dies, the survivor shall have exclusive right. While both of them are still living, if either of them initiates in marrying his ward, no chance shall be left for the other. If both of them contract marriage of the ward simultaneously with the same man, then if it is known as to which of them is prior to the other, the prior one shall be given preference, and the other one shall be cancelled. If it is known that they were contracted at the same time, the marriage contracted by the grandfather shall remain intact, while the one contracted by the father shall be cancelled. If their dates are not known, and it is known as to which of them was prior, subsequent or simultaneous, it shall be obligatory to act according to the rule of brief knowledge (*'Ilm al-Ijmālī*), that she is supposed to be the wife of either of them, then if the date of one of them is known to the exclusion of the other, then if it were the one contracted by the grandfather, it shall be given preference to the one contracted by the father. If it were the one contracted by the father, it shall be given preference over the one contracted by the grandfather. However, caution must not be given up in such case.

Problem # 4. For the validity and effectiveness of a marriage contracted by the father or grandfather, it is a condition that it should be free from vitiating element; otherwise, it shall be treated as one contracted by an unauthorized person, and it shall be contingent on the consent of the minor after attaining maturity, rather it is more caution to observe the minor's benefit.

Problem # 5. If in a marriage of a minor boy or girl contracted by the father or grandfather what is obligatory to observe is observed, they shall have no option after attaining maturity; rather it shall be binding for them.

Problem # 6. If a guardian contracts the marriage of a minor girl against less than her proper dower, or a minor boy against more than the proper dower, then if there was some benefit in it that demanded it to be so, the contract shall be valid, and the dower binding. Then if the benefit lies in the marriage itself excluding the dower, then according to the stronger opinion, the contract shall be valid and binding, while the dower shall be invalid in the sense that it shall be ineffective, and shall be contingent on the minor's consent after attaining maturity, so that if he/she consents to it, it shall be established; otherwise, it shall revert to the proper dower.

Problem # 7. The marriage of an extravagant, idiot person labouring under constant idiocy if contracted during minority or interdiction due to extravagance shall not be valid except with the permission of his father or grandfather or a judge in their absence, and the fixation of the amount of dower and the woman rests with the guardian. If he contracts a marriage without the permission of the guardian, it shall hand in abeyance until the guardian's permission is obtained. If the guardian finds it beneficial and gives permission, it shall be valid, and thee shall be no need of repeating the *Ṣīghah*.

Problem # 8. If a guardian marries his ward to person having some blemish, the contract shall not be valid and enforceable, irrespective of the blemishes being those allowing right of option or otherwise, as when the person is engaged in committing sins, or is a drinker of wine, or having foul tongue and of a bad character, or the like, except when there is a binding interest in the marriage. In such case neither

من العيوب الموجبة للخيار أو غيرها ككونه منهمكاً في المعاصي و كونه شارب الخمر أو بذي اللسان سيء الخلق و أمثال ذلك، إلا إذا كانت مصلحة ملزمة في تزويجه، و حينئذ لم يكن خيار الفسخ لا له و لا للمولىّ عليه إذا لم يكن العيب من العيوب المجوزة للفسخ، و إن كان منها فالظاهر ثبوت الخيار للمولىّ عليه بعد بلوغه، هذا كله مع علم الولي بالعيب، و إلا ففيه تأمل و تردد و إن لا تبعد الصحة مع اعمال جهده في احراز المصلحة، و على الصحة له الخيار في العيوب الموجبة للفسخ، كما أن للمولّى عليه ذلك بعد رفع الحجر عنه، و في غيرها لا خيار له و لا للولي على الأقوى.

مسألة ٩ ـ ينبغي بل يستحب للمرأة المالكة أمرها أن تستأذن أباها أو جدها و ان لم يكونا فأخاها، و ان تعدد الأخ قدمت الأكبر.

مسألة ١٠ ـ هل للوصي أي القيم من قبل الأب أو الجد ولاية على الصغير والصغيرة في النكاح؟ فيه إشكال لا يترك الاحتياط.

مسألة ١١ ـ ليس للحاكم ولاية في النكاح على الصغير ذكراً كان أو أنثى مع فقد الأب و الجد، ولو اقتضت الحاجة و الضرورة و المصلحة اللازمة المراعاة النكاح بحيث ترتب على تركه مفسدة يلزم التحرز عنها قام الحاكم به، و لا يترك الاحتياط بضم إجازة الوصي للأب أو الجد مع وجوده و كذا فيمن بلغ فاسد العقل أو تجدد فساد عقله إذا كان البلوغ و التجدد في زمان حياة الأب أو الجد.

مسألة ١٢ ـ يشترط في ولاية الأولياء البلوغ و العقل و الحرية و الاسلام إذا كان المولىّ عليه مسلماً، فلا ولاية للصغير و الصغيرة على أحد، بل الولاية في موردها لوليهما، و كذا لا ولاية للأب والجد إذا جنّا، و إن جنّ أحدهما يختص الولاية بالآخر، و كذا لا ولاية للأب الكافر على ولده المسلم، فتكون للجد إذا كان مسلماً، و الظاهر ثبوت ولايته على ولده الكافر إذا لم يكن له جد مسلم، و إلا فلا يبعد ثبوتها له دون الكافر.

مسألة ١٣ ـ العقد الصادر من غير الوكيل والولي المسمى بالفضولي يصح مع

the ward nor the guardian shall have option to rescind the contract if there is no blemish allowing dissolution of the marriage. If it were such a blemish, then apparently the right of option of the ward after attaining maturity shall be established. This is all when the guardian had knowledge about the blemish; otherwise, there shall be hesitation and doubt; though it is not far from being valid in case he has made endeavours to observe the ward's interest. In case of its validity, he shall have the right of option where the blemishes are such as allow the dissolution of marriage contract, as the ward shall have its right after the removal of the interdiction. In case otherwise, neither the ward nor the guardian shall have the right of option, according to the stronger opinion.

Problem # 9. It is necessary, rather approved, for a woman having authority to contract her own marriage that she should obtain the permission of her father or grandfather, and, in their absence, of her brother. In case there are several brothers, the eldest shall have precedence.

Problem # 10. Has the executor appointed by the father or grandfather the right to contract the marriage of a minor boy or girl? There is doubt, and so caution must not be given up.

Problem # 11. In the absence of the father and grandfather, a judge has no authority to contract the marriage of a minor, whether male or female. If there is a need, necessity or pressing interest for contracting their marriage as when there is disadvantage in avoiding it, the judge may resort to contract their marriage. Caution must not be given up by adding the permission of the executor appointed by the father or grandfather, if there is one. The same rule shall apply in case the minor has attained maturity with lack of sense or the renewal of lack of sense, if the maturity or renewal of lack of sense has taken place during the lifetime of the father or grandfather.

Problem # 12. It is a condition for the right of guardianship of a guardian that he must be adult, sane, free and Muslim, if the ward is a Muslim. No one has authority over a minor boy or girl; rather, the authority belongs to their guardian. Likewise, the father or grandfather shall have no right of guardianship if they happen to be labouring under insanity. If either of them suffers from insanity, guardianship shall be the exclusive right of the other. Likewise, an infidel father has no right of guardianship of his Muslim son (/or daughter), and it shall belong to the grandfather if he is a Muslim. An infidel father shall be the guardian of his infidel child if there is no Muslim grandfather; otherwise, it is not far from being established for him to the exclusion of the infidel father.

Problem # 13. A marriage contracted by some one other than the agent or guardian, called an unauthorized marriage, is validated after it is consented to by the person concerned, regardless of its being unauthorized from one side or both, and whether the contracted person is a minor an adult, and irrespective of the person contracting the marriage is a near relative of the contracted person like a brother, paternal or maternal uncle, or a stranger. To this category also belongs a marriage contracted

الاجازة، سواء كان فضولياً من الطرفين أو من أحدهما، و سواء كان المعقود عليه صغيراً أو كبيراً، و سواء كان العاقد قريباً للمعقود عليه كالأخ و العم و الخال أو أجنبياً، و منه العقد الصادر من الولي أو الوكيل على غير الوجه المأذون فيه بأن أوقع الولي على خلاف المصلحة أو الوكيل على خلاف ما عينه الموكل.

مسألة ١٤ ـ إن كان المعقود له ممن يصح منه العقد لنفسه بأن كان بالغاً عاقلاً فانما يصح العقد الصادر من الفضولي باجازته، و إن كان ممن لا يصح منه العقد و كان مولىّ عليه بأن كان صغيراً أو مجنوناً فانما يصّح إما باجازة وليه في زمان قصوره أو إجازته بنفسه بعد كماله، فلو أوقع الأجنبي عقداً على الصغير أو الصغيرة وقفت صحة عقده على إجازتها له بعد بلوغهما و رشدهما إن لم يجز أبوهما أو جدهما في حال صغرهما، فأيّ من الاجازتين حصلت كفت، نعم يعتبر في صحة إجازة الولي ما اعتبر في صحة عقده، فلو أجاز العقد الواقع على خلاف مصلحة الصغير لغت إجازته و انحصر الأمر في إجازته بنفسه بعد بلوغه و رشده.

مسألة ١٥ ـ ليست الاجازة على الفور، فلو تأخرت عن العقد بزمن طويل صحت سواء كان التأخير من جهة الجهل بوقوعه أو لأجل التروي أو للاستشارة أو غير ذلك.

مسألة ١٦ ـ لا أثر للاجازة بعد الرد، و كذا لا أثر للرد بعد الاجازة فبها يلزم العقد و به ينفسخ، سواء كان السابق من الرد أو الاجازة واقعاً من المعقود له أو وليه، فلو أجاز أو ردّ وليّ الصغيرين العقد الواقع عليهما فضولاً ليس لهما بعد البلوغ ردّ في الأول و لا إجازة في الثاني.

مسألة ١٧ ـ إذا كان أحد الزوجين كارهاً حال العقد لكن لم يصدر منه رد له فالظاهر أنه يصح لو أجاز بعد ذلك، بل الأقوى صحته بها حتى لو استؤذن فنهى و لم يأذن و مع ذلك أوقع الفضولي العقد.

مسألة ١٨ ـ يكفي في الاجازة المصححة لعقد الفضولي كل مادل على إنشاء الرضا بذلك العقد، بل يكفي الفعل الدال عليه.

by a guardian or an agent when it is contracted in an unauthorized manner, as when it is contracted by a guardian without observing the ward's interest or by the agent contrary to how it has been allowed by the client.

Problem # 14. If the person whose marriage is contracted happens to be one who can contract his own valid marriage as when he is adult and sane, his marriage contacted by an unauthorized person shall be valid if assented to by him. If he happens to be one whose marriage if contracted by himself is not valid, and he is under the guardianship of another, as when he is a minor or a lunatic, then a marriage is valid if contracted with the permission of his guardian during his incapacity or his own permission after attaining the capacity. If a stranger contracts the marriage of a minor boy or girl, its validity shall be contingent on their permission after attaining puberty and maturity, if their father or grandfather has not given permission during their minority. If either of the permissions is obtained, it shall be sufficient.

Of course, it is condition in the validity of the permission of the guardian what is required in the validity of the marriage contracted by him. So if he gives permission for a marriage contracted without observing the minor's interest, it shall be null and void, and its validity shall be contingent on the permission of the minor himself after attaining puberty and maturity.

Problem # 15. It is not necessary to give permission immediately. If it is given a long time after the conclusion of the contract, it shall be valid, regardless of the delay being due to ignorance about the conclusion of the contract or due to deliberation and consultation or the like.

Problem # 16. A permission given after rejection is of no value. Likewise, a rejection made after giving permission has also no legal effect, as the contract becomes binding by permission, and so is it dissolved by it, irrespective of its being prior to the rejection and the permission being given by the person whose marriage is contracted or by his guardian. If the guardian of both minors has permitted or rejected the marriage contracted by an unauthorized person, they shall not be entitled to reject the former or endorse the latter.

Problem # 17. If one of the parties to a marriage contract is reluctant at the time of conclusion of the marriage, but has not issued its rejection, then apparently it shall be valid if it is subsequently assented to by him.

Rather, according to the stronger opinion, it shall be valid even if he is asked his permission and he effuses it and does not give his permission; but nevertheless an unauthorized person contracts the marriage.

Problem # 18. It is sufficient in a permission validating a marriage contracted by an unauthorized person that it should have all that is treated as expression of consent with that contract, rather even a deed to that effect is also sufficient.

Problem # 19. A consent at heart is not sufficient for the validity of a marriage contracted by an

مسألة ١٩ ـ لا يكفي الرضا القلبي في صحة العقد و خروجه عن الفضولية و عدم الاحتياج إلى الاجازة، فلو كان حاضراً حال العقد راضياً به إلا أنه لم يصدر منه قول أو فعل يدل على رضاه فالظاهر أنه من الفضولي، نعم قد يكون السكوت إجازة، و عليه تحمل الأخبار في سكوت البكر.

مسألة ٢٠ ـ لا يعتبر في وقوع العقد فضولياً قصد الفضولية و لا الالتفات اليها، بل المدار في الفضولية و عدمها هو كون العقد بحسب الواقع صادراً عن غير من هو مالك للعقد و ان تخيل خلافه، فلو تخيل كونه ولياً أو وكيلاً و أوقع العقد فتبين خلافه كان من الفضولي و يصح بالاجازة، كما أنه لو اعتقد أنه ليس بوكيل ولا ولي فأوقع العقد بعنوان الفضولية فتبين خلافه صح العقد و لزم بلا توقف على الاجازة مع فرض مراعاة المصلحة.

مسألة ٢١ ـ إن زوج صغيران فضولاً فان أجاز وليها قبل بلوغهما أو أجازا بعد بلوغهما أو بالاختلاف بأن أجاز ولي أحدهما قبل بلوغه و أجاز الآخر بعد بلوغه تثبت الزوجية و يترتب جميع أحكامها، و إن رد وليهما قبل بلوغهما أو رد ولي أحدهما قبل بلوغه أو ردا بعد بلوغهما أو رد أحدهما بعد بلوغه أو ماتا أو مات أحدهما قبل الاجازة بطل العقد من أصله بحيث لم يترتب عليه أثر أصلاً من توارث و غيره من سائر الآثار، نعم لو بلغ أحدهما و أجاز ثم مات قبل بلوغ الآخر و إجازته يعزل من تركته مقدار ما يرث الآخر على تقدير الزوجية، فان بلغ و أجاز يدفع إليه لكن بعد ما حلف على أنه لم تكن إجازته للطمع في الارث، و ان لم يجز أو أجاز و لم يحلف على ذلك لم يدفع اليه بل يرد الى الورثة، و الظاهر أن الحاجة الى الحلف انما هو فيما اذا كان متهماً بأن اجازته لأجل الارث، و أما مع عدمه كما اذا أجاز مع الجهل بموت الآخر أو كان الباقي هو الزوج و كان المهر اللازم عليه على تقدير الزوجية أزيد مما يرث يدفع اليه بدون الحلف.

مسألة ٢٢ ـ كما يترتب الارث على تقدير الاجازة و الحلف يترتب الآثار الأخر المترتبة على الزوجية أيضاً من المهر و حرمة الأم و البنت و حرمتها على أب

unauthorized person and excluding it from such category without there being any need for its permission. If a person was present at the time of the conclusion of the contract and willing with it, except that there was no word of mouth or act indicative of his consent, then apparently it shall be treated as an unauthorized contract. Of course, sometimes silence is also considered equal to consent, and the traditions have also interpreted it in that sense in case of the silence of a virgin.

Problem # 20. In an unauthorized contract, the intention of the person contracting the marriage is of no value and no heed is paid to it. The criterion in a contract being unauthorized or otherwise is its being concluded actually by a person who has no authority to do it, even if he thought it otherwise. So if a person considers himself to be a guardian or an agent, and contracts a marriage, and later its transpires otherwise, it shall be treated as an unauthorized contract, and can be validated by subsequent endorsement, as in case a person considers himself to be neither a guardian not an agent, and contracts the marriage as an unauthorized person, and later it transpires to be otherwise, the contract shall be valid and binding without being dependent on the subsequent permission with the supposition of observance of the (ward's) interest.

Problem # 21. If two minors contract their marriage in an unauthorized way, then if the guardians of both of them give permission before their attaining maturity, or they give permission after their attaining maturity, or differently, so that one of them gives permission before his maturity and the other after attaining maturity, the maternal tie is to be treated as established, and all the laws relating to marriage shall apply to it. If the guardians of both of them reject before the maturity of both of them, or the guardian of one of them rejects it before his attaining maturity, or both of them themselves reject it after attaining maturity, or one of them rejects it after attaining maturity, or both or one of them dies before endorsing it, the contract shall be declared null and void *ab initio*, in the sense that it shall have no legal effect at all like mutual inheritance as well as other effects. Of course, if one of them attain maturity and endorses it, and dies before the other attains maturity and endorses it, an amount of his inheritance shall be kept apart as much as the other would inherit with the supposition of a marital tie between them. Then if the other attains maturity and endorses it, the amount of inheritance kept apart shall be given over to him, but after he takes oath that his endorsement has not been due to the greed of the inheritance. If he fails to endorse the contract, or does endorse it, but fails to take the required oath, the amount of inheritance set apart shall not be given to him, but shall be returned to heirs of the deceased. Apparently the need for taking oath has been imposed in consideration of the suspicion that the endorsement by the other party has been for the sake of the inheritance. In case, however, there is no such suspicion as when the part has endorsed the contract without the knowledge about the death of the other party, of when the surviving part is the husband, and the amount of dower payable by him with the supposition of the marital tie between them is more than that of the inheritance he would get, the inheritance shall be given over to him without taking an oath.

Problem # 22. As inheritance is given on supposition of the endorsement and oath, the other effects also apply after the establishment of the marital tie like dower, prohibition of the mother, daughter of the wife and her prohibition to the father of the husband and his son if the surviving party is the wife, and so

الزوج و ابنه إن كانت الزوجة هي الباقية و غير ذلك، فيترتب جميع الآثار على الحلف في الظاهر على الأقوى.

مسألة ٢٣ ـ الظاهر جريان هذا الحكم في كل مورد مات من لزم العقد من طرفه و بقي من يتوقف زوجيته على اجازته، كما اذا زوّج أحد الصغيرين الولي و زوّج الآخر الفضولي فمات الأول قبل بلوغ الثاني و اجازته بل لا يبعد جريان الحكم فيما لو كانا كبيرين فأجاز أحدهما و مات قبل موت الثاني و إجازته، لكن الحلف مبنى على الاحتياط كالحلف في بعض الصور الأخر.

مسألة ٢٤ ـ إذا كان العقد فضولياً من أحد الطرفين كان لازماً من طرف الأصيل، فلو كان هي الزوجة ليس لها أن تتزوج بالغير قبل أن يرد الآخر العقد و يفسخه، و هل يثبت في حقه تحريم المصاهرة قبل إجازة الآخر وردّه، فلو كان زوجاً حرم عليه نكاح أم المرأة و بنتها و اختها و الخامسة إن كانت هي الرابعة؟ الأحوط ذلك و إن كان الأقوى خلافه.

مسألة ٢٥ ـ إن رد المعقود له أو المعقود لها العقد الواقع فضولاً صار العقد كأنه لم يقع، سواء كان العقد فضولياً من الطرفين ورداه معاً أو رده أحدهما، بل ولو أجاز أحدهما ورد الآخر، أو من طرف واحد ورد ذلك الطرف فتحل المعقود لها على أب المعقود له وابنه و تحل بنتها و أمها على المعقود له.

مسألة ٢٦ ـ إن زوّج الفضولي امرأة برجل من دون اطلاعها و تزوجت هي برجل آخر صح الثاني و لزم و لم يبق محل لاجازة الأول، و كذا لو زوّج الفضولي رجلاً بامرأة من دون اطلاعه و زوّج هو بأمها أو بنتها ثم علم.

مسألة ٢٧ ـ لو زوّج فضوليان امرأة كل منهما برجل كانت بالخيار في إجازة أيهما شاءت، و إن شاءت ردتهما، سواء تقارن العقدان أو تقدم أحدهما على الآخر، و كذلك الحال فيما إذا زوّج أحد الفضوليين رجلاً بامرأة و الآخر بأمها أو بنتها أو أختها فان له إجازة أيهما شاء.

مسألة ٢٨ ـ لو وكلت رجلين في تزويجها فزوّجها كل منهما برجل فان سبق

on. So all the effects become operative apparently after taking oath, according to the stronger opinion.

Problem # 23. Apparently this law shall apply in all cases where the person dies from whose side the contract is binding and the party survives whose marital tie depends on his/her permission, as when one of the minors is married by his/her guardian and the other one is married by an unauthorized person, and the former dies before the other attains maturity and endorses the contract. Rather the law shall also apply in case where both the parties are adult and one of them gives his/her consent for the contract and dies before the death of and endorsement by the other , but the oath is based on caution as the oath in some other cases.

Problem # 24. If the marriage is contracted by an unauthorized person on the side of one of the parties and from the other side it is concluded by the principal party, then it shall be binding from the latter side. If it were the wife, she shall not be allowed to marry another person before the other party rejects the contract or dissolves it. In such case shall the party be governed by prohibition arising out of *Muṣāharah* before the endorsement or rejection of the contract by the other party. If it were the wife, shall the other party be forbidden to marry her mother, daughter or sister or a fifth wife if she were the fourth? According to the more cautious opinion, it shall be so, though according to the stronger opinion, it should be otherwise.

Problem # 25. If the wife or husband whose marriage has been contracted by an unauthorized person rejects the contract, it becomes as if it was never concluded, regardless whether the marriage of both the parties was contracted by an unauthorized person and both of them reject it simultaneously, or one of them rejects it. Rather even if one of the parties endorses it and the other party rejects it. Or if it was concluded by an unauthorized person from one side and that party rejects it, the woman so contracted shall be rendered lawful to the father and son of the man so contracted, and the daughter and mother of the woman shall be rendered lawful to the man.

Problem # 26. If an unauthorized person contracts the marriage of a woman to a man without her information, and she marries another man, the second contract shall be valid and binding, and there shall be no chance for the endorsement of the first contract. The same shall be the case if an unauthorized person contracts the marriage of a man to a woman without informing him, and that man marries her mother or daughter, and then comes to know of the contract.

Problem # 27. If two authorized persons marry a woman to two men, she shall have the right of option to endorse either of them she likes, or to reject both of them if she likes, regardless of their being simultaneous or concluded one after another. The same shall be the law if one of the two unauthorized persons marries a man to a woman and another to her mother, daughter or sister, the woman shall have the right to endorse either of them she likes.

Problem # 28. If a woman appoints two agents to contract her marriage, and each of them marries her to a separate man, then if one of them is prior to the other, the previous one shall be declared valid and the subsequent one null and void. If they are both contracted simultaneously, both shall be declared null

أحدهما صح و لغا الآخر، و إن تقارنا بطلا معاً، و إن لم يعلم الحال فإن علم تاريخ أحدهما حكم بصحته دون الآخر، و إن جهل تاريخهما فان احتمل تقارنهما حكم ببطلانهما معاً في حق كل من الزوجة و الزوجين، و إذا علم عدم التقارن فيعلم إجمالاً بصحة أحد العقدين و تكون المرأة زوجة لأحد الرجلين و أجنبية عن أحدهما، فليس للزوجة أن تتزوج بغيرهما، و لا للغير أن يتزوج بها، لكونها ذات بعل قطعاً، و أما حالها بالنسبة إلى الزوجين وحالهما بالنسبة إليها فـالأولى أن يطلقاها و يجدد النكاح عليها أحدهما برضاها، و إن تعاسرا و كان في التوقف إلى أن يظهر الحال عسر وحرج على الزوجة أولا يرجى ظهور الحال، فالمتجه تعيين الزوج منهما بالقرعة، فيحكم بزوجية من وقعت عليه.

مسألة ٢٩ ـ لو ادعى أحد الزوجين سبق عقده فان صدّقه الآخر و كذا الزوجة أو صدّقه أحدهما و قال الآخر، «لا أدري» فالزوجة لمدعي السبق و إن قال كلاهما: «لا أدري» فوجوب تمكين الزوجة من المدعي بل جوازه محل تأمل إلا إذا رجع عدم دراية الرجل إلى الغفلة حين إجراء العقد و احتمل تطبيقه على الصحيح من باب الاتفاق، و إن صدّقه الآخر و لكن كذّبته الزوجة كانت الدعوى بين الزوجة و كلا الزوجين، فالزوج الأول يدعي زوجيتها و صحة عقده وهي تنكر زوجيته و تدعي فساد عقده، و تنعكس الدعوى بينها و بين الزوج الثاني، حيث انه يدعي فساد عقده وهي تدعي صحته، ففي الدعوى الأولى تكون هي المدعية والزوج هو المنكر، و في الثانية بالعكس، فان أقامت البينة على فساد الأول المستلزم لصحة الثاني حكم لها بزوجيتها للثاني دون الأول، و إن أقام الزوج الثاني بينة على فساد عقده يحكم بعدم زوجيتها له و ثبوتها للأول و إن لم تكن بينة يتوجه الحلف إلى الزوج الأول في الدعوى الأولى والى الزوجة في الدعوى الثانية، فإن حلف الزوج الأول و نكلت الزوجة تثبت زوجيتها للأول، و إن كان العكس بأن حلفت هي دونه حكم بزوجيتها للثاني، و إن حلفا معاً فالمرجع هي القرعة، هذا إذا كان مصب الدعوى صحة العقد و فساده لا السبق

and void. If it is not known, but the date of one of them is known, judgement shall be given in favour of its validity of that contract to the exclusion of the other. If the dates of both of them are not known, but there is likelihood of their being simultaneous, both shall be declared void in respect of the husband and wife. If it is known that they were not simultaneous and there is a brief knowledge about one of them, and the woman is the wife of one of the two men and a stranger to one of them, the woman shall not marry any one other than the two, nor shall any other person be allowed to marry her, due to her having a husband positively. As regards her condition in relation to the two husbands, and their position in relation to her, it is better that both should divorce her and one of them should marry her with her consent de novo. If they do not agree, and it is inconvenient for the woman to wait till the matter comes to light or there is no hope of he matter coming to light, then it is better to determine the husband by casting lots, and to give judgement in favour of the marital tie of the person in whose favour the die is cast.

Problem # 29. If one of the husbands claims his contract to be precedent, then if the other also confirms it, and also the wife, or one of them confirms his claim, and the other says that he does not know, then the woman shall be the wife of the one claiming his contract to be precedent. In case both of them say that they do not know, there shall be hesitation in the wife's obligation to surrender to the embraces of the claimant; rather in its permissibility as well, except that it is said that the ignorance of the man about the time of conclusion of the contract is due to his negligence, and there is likelihood of the validity of his contract by chance. If, however, the other husband confirms the first husband's claim, but the wife refutes it, then the litigation shall be between the wife and both the husbands. Now the first husband claims that the woman is his wife and that his contract is valid, while the woman denies that she is his wife and claims invalidity of his contract, and matter shall be otherwise between the second husband the woman, in so far as he claims invalidity of his contract, while she claims its validity. So in he first case the wife is the claimant and the husband is the denier, and in the second case the case is reverse. If she adduces evidence in favour of the invalidity of the first contract, it shall necessarily prove the validity of the second, and so judgement shall be given in favour of her being the wife of the second to the exclusion of the first. If, however, the second husband adduces evidence in favour of the invalidity of his contract, judgement shall be given against her being his wife and a proof of her being the wife of the first. In the absence of evidence, the oath shall be referred to the first husband in the former case, and to the wife in the latter. If the first husband takes oath, and the wife refuses to take oath, her marital ties with the first husband shall be established. If, however, it is otherwise, so that she takes oath but not the first husband, judgement shall be given in favour of her being the wife of the second. If both [the first husband and wife] take oath, the matter shall be decided by casting lots. This is the procedure when the matter at issue is the claim of validity or invalidity of the contract and not its precedence or otherwise, or her being the wife of one of them or otherwise. In short, the basis for determining the position of claimant and denier is mostly the matter at issue. If each of the husband claim the precedence of his contract, and the wife says that she does not know, the litigation shall be between the

و عدمه أو السبق واللحوق أو الزوجية و عدمها، و بالجملة الميزان في تشخيص المدعي و المنكر غالباً مصب الدعوى، و إن ادعى كل من الزوجين سبق عقده فان قالت الزوجة: «لا أدري» تكون الدعوى بين الزوجين، فان أقام أحدهما بينة دون الآخر حكم له و كانت الزوجة له، و إن أقام كل منهما بينة تعارضت البينتان، فيرجع الى القرعة فيحكم بزوجية من وقعت عليه، و ان لم تكن بينة يتوجه الحلف اليهما، فان حلف أحدهما حكم له، و إن حلفا أو نكلا يرجع الى القرعة، و ان صدقت المرأة أحدهما كان أحد طرفي الدعوى من لم تصدقه الزوجة، و الطرف الآخر الزوج الآخر مع الزوجة، فمع إقامة البينة من أحد الطرفين أو من كليهما الحكم كما مر، و أما مع عدمها و انتهاء الأمر إلى الحلف فان حلف من لم تصدقه الزوجة يحكم له على كل من الزوجة و الزوج الآخر، و أما مع حلف من صدقته فلا يترتب على حلفه رفع دعوى الزوج الآخر على الزوجة، بل لابد من حلفها أيضاً.

مسألة ٣٠ ـ لو زوج أحد الوكيلين عن الرجل له امرأة و الآخر بنتها صح السابق و لغا اللاحق، و مع التقارن بطلا معاً، و إن لم يعلم السابق فان علم تاريخ أحدهما حكم بصحته دون الآخر، و إن جهل تاريخهما فان احتمل تقارنهما يحكم ببطلان كليهما، و إن علم بعدم التقارن فقد علم بصحة أحد العقدين و بطلان أحدهما، فلا يجوز للزوج مقاربة واحدة منهما، كما أنه لا يجوز لهما التمكين منه، نعم يجوز له النظر إلى الأم، و لا يجب عليها التستّر عنه، للعلم بأنه إما زوجها أو زوج بنتها، و أما البنت فحيث إنه لم يحرز زوجيتها و بنت الزوجة انما يحل النظر اليها إن دخل بالأم و المفروض عدمه فلم يحرز ما هو سبب لحلية النظر إليها، و يجب عليها التستّر عنه، نعم لو فرض الدخول بالأم ولو بالشبهة كان حالها حال الأم.

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two husbands. Then if one of them adduces evidence and not the other, judgement shall be given in his favour, and the woman shall be his wife. If each of them adduces evidence, both the evidences shall be contradictory of each other. So the matter shall be decided by casting lots, and the judgement shall be given in favour of the party in whose favour the die is cast.

If there is no evidence, both of them shall be asked to take oath. If one of them takes oath, judgement shall be given in his favour. If both of them take oath, or refuse, the matter shall be decided by casting lots.

If the wife confirms the claim of one of them, then one of the two parties shall be the one whose claim is not confirmed by the wife, while the other party shall be the other husband together with the wife. If evidence is adduced by either or both of the two parties, judgement shall be given as mentioned earlier. In absence of evidence, the matter shall be decided by taking oath. So if the husband whose claim has not been confirmed by the wife takes oath, judgement shall be given in his favour and against the wife and the other husband. If, however, the other husband whose claim has been confirmed by the wife takes oath, then his oath shall not eliminate the claim of the other husband against the wife, and so it shall be indispensable for her to take oath as well.

Problem # 30. If one of the two agents of a man contracts his marriage with one woman and the other with her daughter, the prior in date shall be declared valid and the subsequent one shall be declared void. If both of them are contracted on the same date, both shall be declared void. If it is not known which one of them is prior in date to the other, but the date of them is known, judgement shall be given in its favour to the exclusion of the other.

If the dates of both of them are not known, then if there is likelihood of their being simultaneous, both shall be declared void. If it is known that both of them have not been simultaneous, then it is known that one of them is valid and the other void. In such case it shall not be lawful for the husband to have sexual intercourse with either of them, in the same way as it shall not be lawful for either of them to surrender herself to the embraces of the husband. He may look at the mothers [of the wives] and shall not be obligatory upon them to hide themselves from him due to the knowledge that he is the husband of either herself or her daughter.

As regards the daughter, as it has not been decided whether she is herself the wife of the man or is the daughter of his wife, it shall be lawful for him to look at her if he has already consummated with the mother. Now what is supposed is the absence of consummation, and so the cause of lawfulness of his looking at her has not taken place, so she should hide herself from him.

Of course, if it is supposed that consummation with the mother has taken place, even under semblance of right, her case shall be similar to that of the mother.

فصل في أسباب التحريم

أعني ما بسببه يحرم و لا يصح تزويج الرجل بالمرأة و لا يقع الزواج بينهما، وهي أمور: النسب و الرضاع و المصاهرة و ما يلحق بها والكفر وعدم الكفاءة و استيفاء العدد و الاعتداد و الاحرام.

القول في النسب

يحرم بالنسب سبعة أصناف من النساء على سبعة أصناف من الرجال: الأم بما شملت الجدات عاليات و سافلات، لأب كن أو لأم، فتحرم المرأة على ابنها وعلى ابن ابنها و ابن ابن ابنها وعلى ابن بنتها وابن بنت بنتها و ابن بنت ابنها و هكذا، و بالجملة تحرم على كل ذكر ينتمي اليها بالولادة، سواء كان بلا واسطة أو بواسطة أو وسائط، و سواء كانت الوسائط ذكوراً أو إناثاً أو بالاختلاف.

والبنت بما شملت الحفيدة ولو بواسطة أو وسائط، فتحرم هي على أبيها بما شمل الجد لأب كان أو لأم، فتحرم على الرجل بنته، و بنت ابنه وبنت ابن ابنه، و بنت بنته، و بنت بنت بنته، و بنت ابن بنته، و بالجملة كل أنثى تنتمي اليه بالولادة بواسطة أو وسائط ذكوراً كانوا أو إناثاً أو بالاختلاف.

والأخت لأب كانت أو لأم أو لهما.

و بنت الأخ سواء كان لأب أو لأم أو لهما، وهي كل مرأة تنتمي بالولادة الى أخيه بلا واسطة أو معها و ان كثرت، سواء كان الانتماء اليه بالآباء أو الأمهات أو بالاختلاف، فتحرم عليه بنت أخيه، و بنت ابنه و بنت ابن ابنه، و بنت بنته، و بنت بنت بنته، و بنت ابن بنته و هكذا.

و بنت الأخت، وهي كل أنثى تنتمي الى أخته بالولادة على النحو الذي

Chapter Three - Causes of Prohibition in Marriage

Causes of Prohibition in Marriage mean the causes for which marriage of a man with a woman is prohibited and their marriage is not valid, and marriage does not take place between them. They are as follows; *Nasab* or Consanguinity, *Riḍā'*or Fosterage, *Muṣāharah* or Affinity and what is affiliated with it, *Kufr* or Infidelity, *'Adam al-Kafa'ah* or Absence of Equality, *Istīfā' al-'Adad* or Completion of the Number [of Wives), *I'tidād* or Non-Completion of *'Iddah* and *Iḥrām*.

First Cause of Prohibition - *Nasab* or Consanguinity

Seven Classes of women are prohibited to seven Classes of men by *Nasab* or Consanguinity, namely,

I. The Mother. This includes the grandmothers, high and low, related through the father or mother. So the mother is prohibited to her own son, her son's son, the son of her son's son, and her daughter's son, son of her daughter's daughter and son of her son's daughter, and so on. In short she is prohibited to every male who is related to her by birth , irrespective of his being related directly, indirectly or through intermediaries, and whether the intermediaries are males or females, or different.

2. The Daughter. This includes the grand-daughter, related directly or through intermediaries. So she is prohibited to her father that includes the paternal or maternal grandfather. So to a man is prohibited his daughter, his son's daughter, daughter of his son's son, daughter of his daughter, daughter of his daughter's daughter, daughter of his daughter's son.

In short, to a man is prohibited every female related to him by birth through an intermediary or intermediaries, male or female, or different.

3. The Sister, by father or mother or by both.

4. The Daughter of a Brother, by father or mother, or by both. This includes every woman who is related to one's brother by birth, directly or through intermediaries, even if several, whether related to him by fathers or mothers or differently. So to a man are prohibited the daughter of his brother, his son's daughter, the daughter of his son's son, his daughter's daughter, the daughter of his daughter's daughter and the daughter of his daughter's son, and so on.

5. The Daughter of a Sister. This includes every female related to one's daughter by birth in a manner

ذكر في بنت الأخ.

و العمة، وهي أخت أبيه لأب أو لأم أو لهما، و المراد بها ما تشمل العاليات أعني عمة الأب: أخت الجد للأب لأب أو لأم أو لهما، و عمة الأم: أخت أبيها لأب أو لأم أو لهما، و عمة الجد للأب و الجد للأم و الجدة كذلك ، فمراتب العمات مراتب الآباء، فهي كل أنثى تكون أختاً لذكر ينتمي اليك بالولادة من طرف أبيك أو أمك.

والخالة، والمراد بها أيضاً ما تشمل العاليات، فهي كالعمة إلا أنها أخت إحدى أمهاتك ولو من طرف أبيك، و العمة أخت أحد آبائك ولو من طرف أمك، فأخت جدتك للأب خالتك حيث أنها خالة أبيك ، و أخت جدك للأم عمتك حيث أنها عمة أمك .

مسألة ١ ـ لا تحرم عمة العمة و لا خالة الخالة ما لم تدخلا في عنواني العمة و الخالة ولو بالواسطة، و هما قد تدخلان فيهما فتحرمان، كما اذا كانت عمتك أختاً لا بيك لأب و أم أو لأب، و لأبي أبيك أخت لأب أو أم أو لهما فهذه عمة لعمتك بلا واسطة، و عمة لك معها، و كما اذا كانت خالتك أختاً لأمك لأمها أو لأمها و أبيها و كانت لأم أمك أخت فهي خالة لخالتك بلا واسطة، و خالة لك معها، و قد لا تدخلان فيهما فلا تحرمان، كما اذا كانت عمتك أختاً لأبيك لأمه لا لأبيه و كانت لأبي الأخت أخت فالاخت الثانية عمة لعمتك ، و ليس بينك و بينها نسب أصلاً، و كما إذا كانت خالتك أختاً لأمك لأبيها لا لأمها و كانت لأم الأخت أخت فهي خالة لخالتك و ليست خالتك ولو مع الواسطة، و كذلك أخت الأخ أو الأخت انما تحرم اذا كانت أختاً لا مطلقاً، فلو كان لك أخ أو أخت لأبيك و كانت لأمّها بنت من زوج آخر فهي أخت لأخيك أو أختك و ليست أختاً لك لا من طرف أبيك و لا من طرف أمك، فلا تحرم عليك.

مسألة ٢ ـ النسب اما شرعي و هو ما كان بسبب وطء حلال ذاتاً بسبب شرعي من نكاح أو ملك يمين أو تحليل و ان حرم لعارض من حيض أو صيام أو

already mentioned under the Daughter of a Brother.

6. The Paternal Aunt. This means the sister of one's father, by father or mother, or by both. This include the paternal aunts of high degree, that means the paternal aunt of father, i.e., paternal aunt of one's grandfather, by father or mother or by both, and the paternal aunt of mother, i.e., the sister of her father, by father, mother or by both, the paternal aunt of one's paternal or maternal grandfather, the paternal aunt of one's grandmother in similar manner. So the degrees of the paternal aunts are similar to the degrees of fathers. So its means every female who is the sister of a male related to a man by birth by his father or mother.

7. The Maternal Aunt. This also means to include the maternal aunts of higher degrees. So she is similar to the paternal aunt, except that she is the sister of one of the mothers of a man, even if by father, while a paternal aunt is the sister of one of the fathers of a man, even if by mother. So the sister of one's paternal grandfather is one's maternal aunt in so far as she is the maternal aunt of one's father, and the sister of one's maternal grandfather is one's paternal aunt in so far as she is the paternal aunt of one's mother.

Problem # 1. A paternal aunt's paternal aunt or a maternal aunt's maternal aunt is not prohibited to a man as long as they are not included in the category of a paternal or maternal aunt, even if indirectly, but once they are included in the category of a paternal or maternal aunt, they shall be prohibited, as when one's paternal aunt is the sister of his father by both father and mother or by father, the sister of one's father's father by father or mother or by both shall be the paternal aunt of one's paternal aunt directly and at the same time one's paternal aunt indirectly. Likewise, one's maternal aunt is the sister of one's mother by mother or by both mother and father. So if there is a sister of one's mother's mother, she shall be the maternal aunt of his maternal aunt directly, and at the same time his maternal aunt indirectly. Sometimes they are not included in these two categories, and so they are not prohibited, as when one's paternal aunt is the sister of his father by mother and not by father, and there is a sister's, and if such woman's father has a sister., she shall be called his paternal aunt's paternal aunt, but there shall be no consanguine relation between her and him absolutely..

Likewise, if one's maternal aunt is the sister of his mother by father and not by mother and there is a sister of the sister's mother, she shall be his maternal aunt's maternal aunt, but she shall not be his maternal aunt even indirectly.

Likewise, the sister of a brother or sister shall be prohibited as long as she is the sister but not absolutely. So if one has a brother or sister by father [alone] , and their mother has a daughter from another husband, she shall be the sister of his brother or sister, but not his daughter, neither by father nor mother, and so she shall not be prohibited to him.

Problem # 2, Consanguinity is of two kinds: lawful and unlawful. A legal consanguine relation is created by legal cause as a marriage, right of ownership [of a slave-girl] or by legalization (*Taḥlīl*), even if it is

اعتكاف أو احرام و نحوها، و يلحق به وطء الشبهة،و اما غير شرعي، و هو ما حصل بالسفاح و الزنا، و الأحكام المترتبة على النسب الثابتة في الشرع من التوارث و غيره و إن اختصت بالأول، لكن الظاهر بل المقطوع أن موضوع حرمة النكاح أعم، فيعم غير الشرعي، فلو زنا بامرأة فولدت منه ذكراً و أنثى حرمت المزاوجة بينهما، و كذا بين كل منهما و بين أولاد الزاني و الزانية الحاصلين بالنكاح الصحيح أو بالزنا بامرأة أخرى، و كذا حرمت الزانية و أمها و أم الزاني و أختهن على الذكر، و حرمت الأنثى على الزاني و أبيه و أجداده و إخوته و أعمامه.

مسألة ٣ ـ المراد بوطء الشبهة الوطء الذي ليس بمستحق مع عدم العلم بالتحريم، كما إذا وطأ أجنبية باعتقاد أنها زوجته، أو مع عدم الطريق المعتبر عليه بل أو الأصل كذلك، و مع ذلك فالمسألة محل إشكال، و يلحق به وطء المجنون و النائم و شبههما دون السكران إذا كان سكره بشرب المسكر عن عمد و عصيان.

القول في الرضاع

انتشار الحرمة بالرضاع يتوقف على شروط: الأول ـ أن يكون اللبن حاصلاً من وطء جائز شرعاً بسبب نكاح أو ملك يمين أو تحليل و ما بحكمه كسبق الماء الى فرج حليلته من غير وطء، و يلحق به وطء الشبهة على الأقوى، فلو در اللبن من الامرأة من دون نكاح و ما يلحق به لم ينشر الحرمة، و كذا لو كان من دون وطء و ما يلحق به ولو مع النكاح، و كذا لو كان اللبن من الزنا، بل الظاهر اعتبار كون الدر بعد الولادة، فلو در من غير ولادة ولو مع الحمل لم تنشر به الحرمة على الأقوى.

مسألة ١ ـ لا يعتبر في النشر بقاء المرأة في حبال الرجل، فلو طلقها الزوج أو مات عنها وهي حامل منه أو مرضعة فأرضعت ولداً نشر الحرمة، و إن تزوجت و

prohibited due to some temporary cause as menstruation, fasting, religious
seclusion (*I'tikāf*) or *Iḥrām* or the like, and to it is affiliated an intercourse under a semblance of right. As regards the unlawful consanguine relation, it is created by debauchery and fornication. Although the laws relating to consanguinity established by law like mutual inheritance, etc, are exclusively applicable to the first kind, yet apparently, rather definitely, the matter of prohibition of marriage is of a general nature, and so they also relate to the unlawful consanguinity. So if a man commits adultery with a woman, and two male and female children are born to her [as a result of the adultery], the male and female children born to the woman shall be forbidden to marry each other. Similarly, each of them shall be prohibited to marry the children of the adulterer or adulteress born to another woman through lawful marriage or adultery.

Likewise, the adulteress and her mother as well as the mother of the adulterer and their sisters shall be prohibited to the male child [born of adultery], and the female child [born of the adultery] shall be prohibited to the adulterer, his father, grandfathers, brethren and paternal uncles.

Problem # 3. By an intercourse under a semblance of right is the one performed without a right and without the knowledge of its prohibition, as when a man performs sexual intercourse with a stranger woman under the impression that she is his wife, or without a reliable permission or a reliable basis for it. In spite of that the matter is ambiguous. To this category is affiliated an intercourse performed by a lunatic, or one while sleeping, or the like, excluding one in a state of intoxication, when his intoxication is the result of drinking an intoxicant deliberately and sinfully.

Second Cause of Prohibition - *Riḍā'* or Fosterage

Prohibition induced by Fosterage depends on the following conditions:

Firstly, the milk must proceed from an intercourse having legal sanction by means of a marriage, right of ownership [of a slave-girl] or *Taḥlīl* (as performed by a *Muḥallil*) or one falling under such category, as by entrance of the sperm into the vagina of the woman without the performance of actual intercourse. According to the stronger opinion, to this category is affiliated an intercourse performed under a semblance of right. If milk proceeds from a woman without marriage or what is affiliated with it, no prohibition shall ensue. The same is the case when milk proceeds without performance of intercourse or what is affiliated with it, even in spite of conclusion of marriage. The same law shall apply in case of the milk proceeding as a result of fornication. Rather it is a condition that the milk must arise after the delivery of a child. If it proceeds without the delivery of a child, despite pregnancy, no prohibition shall ensue, according to the stronger opinion.
Problem # 1. It is not a condition for the prohibition that the woman must continue to be in the wedlock of the husband. So if the husband divorces her, or dies while she is pregnant or suckling a child, and

دخل بها الزوج الثاني و لم تحمل منه أو حملت منه و كان اللبن بحاله لم ينقطع و لم تحدث فيه زيادة، بل مع حدوثها إذا احتمل كونه للأول. الثاني- أن يكون شرب اللبن بالامتصاص من الثدي، فلو وجر في حلقه اللبن أو شرب المحلوب من المرأة لم ينشر الحرمة، الثالث- أن تكون المرضعة حية، فلو ماتت في أثناء الرضاع و أكمل النصاب حال موتها ولو رضعة لم ينشر الحرمة، الرابع- أن يكون المرتضع في أثناء الحولين و قبل استكمالها، فلا عبرة برضاعه بعدهما، و لا يعتبر الحولان في ولد المرضعة على الأقوى، فلو وقع الرضاع بعد كمال حوليه نشر الحرمة إذا كان قبل حولي المرتضع.

مسألة ٢ - المراد بالحولين أربع و عشرون شهراً هلالياً من حين الولادة، ولو وقعت في أثناء الشهر يكمل من الشهر الخامس و العشرين، ما مضى من الشهر الأول على الأظهر، فلو تولد في العاشر من شهر تكمل حولاه في العاشر من الخامس والعشرين.

الشرط الخامس- الكمية، وهي بلوغه حداً معيناً، فلا يكفي مسمى الرضاع و لا رضعة كاملة، و له تحديدات و تقديرات ثلاثة: الأثر و الزمان و العدد، و أيّ منها حصل كفى في نشر الحرمة، و لا يبعد كون الأثر هو الأصل و الباقيان أمارتان عليه، لكن لا يترك الاحتياط لو فرض حصول أحدهما دونه، فأمّا الأثر فهو أن يرضع بمقدار نبت اللحم و شد العظم، و أمّا الزمان فهو أن يرتضع من المرأة يوماً و ليلة مع اتصالها بأن يكون غذاؤه في هذه المدة منحصراً بلبن المرأة، و أما العدد فهو أن يرتضع منها خمس عشرة رضعة كاملة.

مسألة ٣ - المعتبر في إنبات اللحم و شد العظم استقلال الرضاع في حصولها على وجه ينسبان إليه، فلو فرض ضم السكر و نحوه إليه على نحو ينسبان إليهما أشكل ثبوت التحريم، كما أن المدار هو الانبات والشد المعتد به منهما على نحو مبان يصدقان عرفاً، و لا يكفي حصولها بالدقة العقلية، و إذا شك في حصولها بهذه المرتبة أو استقلال الرضاع في حصولها يرجع الى التقديرين الآخرين.

she suckles a child, prohibition shall ensue, even if she marries another husband who has sexual intercourse with her without resulting in pregnancy, or resulting in pregnancy but the milk is intact and has neither discontinue nor has its amount increased; rather even if it has increased, but there is likelihood of its belonging to the first husband.

Secondly, the milk must be suckled from the beast. If the milk is poured into the child's mouth, or the child drinks the milk taken from the breast of the woman, no prohibition shall be incurred.

Thirdly, the woman whose milk is suckled must be alive. So if the woman dies during suckling, and the required number of suckling is completed after she is dead, even if for once, it shall not incur prohibition. **Fourthly**, the child suckled should not have completed two years, and he suckling should take place before the completion of two years, so that the fosterage after two years shall have no legal value. According to the stronger opinion, it is not a condition that the child of the suckling woman must be two years of age, so that if the suckling takes place after her own child having completed two years, it shall incur prohibition if it were before the child completes two years.

Problem # 2. By two years is meant twenty-four lunar months since the birth of the suckling child. If it takes place during the month, the deficit from the first month shall be completed out of the twenty-fifth month, according to the more evident opinion. If the child is born on the tenth of a month, his two years shall be completed by adding ten days from the twenty-fifth month.

Fifthly, the quantity of the milk, that is required to be fulfilled up to a prescribed limit. It is not sufficient to call it fosterage, nor a complete act of suckling. There are three prescribed limits for it, namely, effect, duration and number of acts of suckling, whichever of them is fulfilled, shall ensue prohibition. It is not far from being the effect the principal condition, and the other two being its indications, but caution must not be given up if one of these two conditions is fulfilled without the condition of effect. As regards the effect, it is that the child must be suckled milk up to the amount required for growth of flesh and strengthening of bones. As regards the duration, it is required that the child must be suckled by the woman for one day and night continuously so that during that period the child's food should be confined to the milk of the nurse. As regards the number of the acts of suckling, it is required that child must be suckled for fifteen complete acts of suckling.

Problem # 3. It is a condition in the growth of the flesh and strengthening of the bones that they should be obtained by means of suckling in a way that the two effects may be ascribed to the act of suckling. If it is supposed that sugar etc. is added to the milk in a way that the two effects may be ascribed to the milk and sugar both, there shall be hesitation in the inducement of prohibition, as the criterion for the growth of flesh and strength of may be the result of them in a way it is confirmed by custom. It is not sufficient to measure them according to the standards of reason. If there is some doubt in the realisation of these effects, or the role of suckling as the sole means for their fulfilment, the other two conditions shall be taken into account.

مسألة ٤ ـ يعتبر في التقدير بالزمان أن يكون غذاؤه في اليوم و الليلة منحصراً باللبن، و لا يقدح شرب الماء للعطش و لا ما يأكل أو يشرب دواء إن لم يخرج ذلك عن المتعارف، و الظاهر كفاية التلفيق في التقدير بالزمان لو ابتدأ بالرضاع في أثناء الليل أو النهار.

مسألة ٥ ـ يعتبر في التقدير بالعدد أمور: **منها-** كمال الرضعة بأن يروى الصبي و يصدر من قبل نفسه، و لا تحسب الرضعة الناقصة و لا تضم الناقصات بعضها ببعض بأن تحسب رضعتان ناقصتان أو ثلاث رضعات ناقصات مثلاً واحدة، نعم لو التقم الصبي الثدي ثم رفضه لا بقصد الاعراض بأن كان للتنفس أو الالتفات إلى ملاعب أو الانتقال من ثدي الى آخر أو غير ذلك كان الكل رضعة واحدة.

و منها- توالي الرضعات بأن لا يفصل بينها رضاع امرأة أخرى رضاعاً تاماً كاملاً على الأقوى و مطلقا على الأحوط، نعم لا يقدح القليل جداً، و لا يقدح في التوالي تخلل غير الرضاع من المأكول و المشروب و إن تغذى به.

و منها- أن يكون كمال العدد من امرأة واحدة، فلو ارتضع بعض الرضعات من امرأة و أكملها من امرأة أخرى لم ينشر الحرمة و إن اتحد الفحل، فلا تكون واحدة من المرضعتين أماً للمرتضع و لا الفحل أباً له.

و منها- اتحاد الفحل بأن يكون تمام العدد من لبن فحل واحد، و لا يكفي اتحاد المرضعة، فلو أرضعت امرأة من لبن فحل ثمان رضعات ثم طلقها الفحل و تزوجت بآخر و حملت منه ثم أرضعت ذلك الطفل من لبن الفحل الثاني تكملة العدد من دون تخلل رضاع امرأة أخرى في البين بأن يتغذى الولد في هذه المدة المتخللة بالمأكول والمشروب لم ينتشر الحرمة.

مسألة ٦ ـ ما ذكرناه من الشروط شروط لناشرية الرضاع للحرمة، فلو انتفى بعضها لا أثر له و ليس بناشر لها أصلاً حتى بين الفحل و المرتضعة و كذا بين المرتضع والمرضعة فضلاً عن الأصول و الفروع و الحواشي، و في الرضاع شرط

Problem # 4. It is a condition in the measurement by duration that the food of the child during the day and night must be confined to the milk .It is, however, not vitiated by drinking water to satisfy thirst , or what the child eats or drinks as a medicine provided it does not exceed the usual quantity.

Apparently it is sufficient to make compensation in the duration of suckling if it has started at a fixed time during the day and night.

Problem # 5. As regards the measurement by number of acts of suckling, there are the following conditions in it.

Firstly, the child must be suckled so much of milk as would satisfy it and it would take out the breast by itself. An incomplete act of suckling shall not be taken into account, nor shall several incomplete acts shall be added so that two or three incomplete acts may be considered equal to a single act. Of course, if the child puts the breast into its mouth, then takes it out not for giving it up but just to breathe, or is attracted by some playthings, or leaves one breast for another, etc. it shall be called a single act.

Secondly, The suckling must be uninterrupted, so that there must not be any intervening suckling by another woman completely according to the stronger opinion, and at all, according to the more cautious opinion. Of course, a very small amount shall not have any adverse effect, nor shall it be interrupted by giving any eatables or drinks excluding suckling by another woman, even if it is fed by such things.

Thirdly, all the required number of acts must be completed by a single woman. If the child is suckled some of the act by one woman and they are completed by another, no prohibition shall ensue, even if they are the wives of a single husband, so that neither of the two suckling women shall be prohibited to the suckling child, nor their husband shall be considered its foster father.

Fourthly, all the acts of suckling must be completed with the milk belonging to a single husband, and it is sufficient that there should a single nurse. So if a woman suckles the child for eight acts with the milk of one husband, and then her husband divorces her and she marries another husband, and becomes pregnant by him, and then suckles the child upon the milk of the second husband by completing the required number of acts without any intervening acts by another nurse, the child being given eatables and drinks during the intervening period, no prohibition shall be incurred.

Problem # 6. The conditions mentioned by us are those that are required for the prohibition by fosterage. If any of the conditions is not fulfilled, the fosterage shall have no effect, and no prohibition shall be incurred between the nurse's husband and the female child or the male child and the nurse, let alone the Principal, Secondary and Marginal consanguines. In Fosterage, there is another condition in addition to the conditions already mentioned that exclusively relates to the prohibition between two

آخر زائد على ما مر مختص بنشر الحرمة بين المرتضعين و بين أحدهما و فروع الآخر، و بعبارة أخرى شرط لتحقق الأخوة الرضاعية بين المرتضعين، و هو اتحاد الفحل الذي ارتضع المرتضعان من لبنه، فلو ارتضع صبي من امرأة من لبن شخص رضاعاً كاملاً و ارتضعت صبية من تلك المرأة من لبن شخص آخر كذلك بأن طلقها الأول و زوجها الثاني و صارت ذات لبن منه فأرضعتها رضاعاً كاملاً لم تحرم الصبية على ذلك الصبي و لا فروع أحدهما على الآخر، بخلاف ما إذا كان الفحل و صاحب اللبن واحداً و تعددت المرضعة، كما إذا كانت لشخص نسوة متعددة و أرضعت كل واحدة منهن من لبنه طفلاً رضاعاً كاملاً فانه يحرم بعضهم على بعض و على فروعه، لحصول الأخوة الرضاعية بينهم.

مسألة ٧ - إذا تحقق الرضاع الجامع للشرائط صار الفحل و المرضعة أباً و أماً للمرتضع، و أصولهما أجداداً وجدات و فروعهما إخوة و أولاد إخوة له، و من في حاشيتهما و في حاشية أصولهما أعماماً أو عمات و أخوالاً أو خالات له، و صار هو أعني المرتضع ابناً أو بنتاً لهما، و فروعه أحفاداً لهما، و إذا تبين ذلك فكل عنوان نسبي محرم من العناوين السبعة المتقدمة إذا تحقق مثله في الرضاع يكون محرماً، فالأم الرضاعية كالأم النسبية و البنت الرضاعية كالبنت النسبية و هكذا، فلو أرضعت امرأة من لبن فحل طفلاً حرمت المرضعة و أمها و أم الفحل على المرتضع للأمومه، و المرتضعة و بناتها و بنات المرتضع على الفحل و على أبيه وأبي المرضعة للبنتية، و حرمت أخت الفحل و أخت المرضعة على المرتضع لكونهما عمة و خالة له، و المرتضعة على أخي الفحل و أخي المرضعة لكونها بنت أخ أو بنت أخت لهما، وحرمت بنات الفحل على المرتضع و المرتضعة على أبنائه نسبيين كانوا أم رضاعيين، و كذا بنات المرضعة على المرتضع و المرتضعة على أبنائها إذا كانوا نسبيين للأخوة و أما أولاد المرضعة الرضاعيون ممن أرضعتهم بلبن فحل آخر غير الفحل الذي ارتضع المرتضع بلبنه فلم يحرموا على المرتضع لما مرّ من اشتراط اتحاد الفحل في نشر الحرمة بين المرتضعين.

suckling children, and between one of them and the Secondary consnguines of the other. In other words, it is a condition of the creation of brotherhood on the basis of Fosterage between two suckling children. It relates to the condition that there must be the same husband of the nurse who has suckled both the children on the milk belonging to the husband. So if a male child is suckled by a woman on the milk belonging to a husband for the complete number of acts required in fosterage, and a female child is suckled by the same woman on the milk belonging to another husband in the same way, so that the first husband divorces her and she marries another husband, and gets milk from that husband and suckles the female child on that milk for the complete number of acts required in fosterage, the female child shall not be prohibited to that male child, nor shall the Secondary consanguines of one of them be prohibited to the other, contrary to the case when the husband and master of the milk were the same and there were several nurses suckling [on the milk belonging to that husband), as when a single husband has several wives and each of them suckles a child for the complete number of acts required in fosterage, they shall be prohibited to one another and to the Secondary consanguines of one another due to the creation of brotherhood on the basis of fosterage.

Problem # 7. If fosterage takes place comprehensively required by its conditions the husband and the nurse become the father and mother of the fostered child, and the Principal consanguines grandfathers and grandmothers, the Secondary consanguines of both brethren and the brethren's children of the fostered child, and the Marginal consanguines of both of them and the Marginal consanguines of the Principal consanguines of both of them his paternal and maternal uncles and aunts, and the fostered child shall become the son or daughter of both of them, and his Secondary consanguines the grandchildren of both of. When such relationship is created, each of the seven classes prohibited by consanguinity mentioned before shall become prohibited by fosterage. So the foster mother shall be like the consanguine mother, and the foster daughter like the consanguine daughter, and so on. If a woman suckles a male child on the milk belonging to her husband, the nurse and her mother and her husband's mother shall be prohibited to the fostered child for motherhood, and the female fostered child and her daughters and the daughters of the male fostered child shall be rendered prohibited to the nurse's husband and his father and the nurse's father due to filial relationship; the sister of the nurse and that of her husband shall be rendered prohibited to the fostered male child due to their becoming his paternal and maternal aunts, and he female fostered child shall be rendered prohibited to the brother of the nurse and that of her husband due to becoming their brother's sister's daughter; and daughters of the nurse's husband to the male fostered child and the female fostered child to his sons , irrespective of their being related by consanguinity or fosterage. Similarly the daughters of the nurse shall be prohibited to the male child and the female fostered child to her consanguine sons due to brotherhood. The foster children of the nurse, however, whom the nurse has sucked on the milk belonging to a husband other than the one on whose milk he has suckled the male fostered child shall not be prohibited to the male fostered child as already mentioned that there is condition that the milk of two foster children suckled by a nurse should belong to the same husband in order to create prohibition between the two foster children.

مسألة ٨ ـ تكفي في حصول العلاقة الرضاعية المحرمة دخالة الرضاع فيه في الجملة، فقد تحصل من دون دخالة غيره فيها كعلاقة الأبوة و الأمومة و الابنية و البنتية الحاصلة بين الفحل و المرضعة و بين المرتضع، و كذا الحاصلة بينه و بين أصولهما الرضاعيين، كما إذا كان لهما أب أو أم من الرضاعة حيث انهما جد وجدة للمرتضع من جهة الرضاع محضاً، و قد تحصل به مع دخالة النسب في حصولها كعلاقة الأخوة الحاصلة بين المرتضع و أولاد الفحل و المرضعة النسبيين، فانهم و إن كانوا منسوبين إليهما بالولادة إلا أن أخوتهم للمرتضع حصلت بسبب الرضاع، فهم إخوة أو أخوات له من الرضاعة، توضيح ذلك: أن النسبة بين شخصين قد تحصل بعلاقة واحدة كالنسبة بين الولد و والده و والدته، و قد تحصل بعلاقتين كالنسبة بين الأخوين، فانها تحصل بعلاقة كل منهما مع الأب أو الأم أو كليهما، و كالنسبة بين الشخص وجده الأدنى، فانها تحصل بعلاقة بينه و بين أبيه مثلاً و علاقة بين أبيه و بين جده، و قد تحصل بعلاقات ثلاث كالنسبة بين الشخص و بين جده الثاني، وكالنسبة بينه و بين عمه الأدنى، فانه تحصل بعلاقة بينك و بين أبيك و بعلاقة كل من أبيك و أخيه مع أبيهما مثلاً، و هكذا تتصاعد و تتنازل النسب و تنشعب بقلة العلاقات و كثرتها حتى أنه قد تتوقف نسبة بين شخصين على عشر علائق أو أقل أو أكثر و إذا تبين ذلك فان كانت تلك العلائق كلها حاصلة بالولادة كانت العلاقة نسبية، و إن حصلت كلها أو بعضها ولو واحدة من العشر بالرضاع كانت العلاقة رضاعية.

مسألة ٩ ـ لما كانت المصاهرة ـ التي هي أحد أسباب تحريم النكاح كما يأتي ـ علاقة بين أحد الزوجين و بعض أقرباء الآخر فهي تتوقف على أمرين: مزاوجة و قرابة، و الرضاع انما يقوم مقام الثاني دون الأول، فرضعة ولدك لا تكون بمنزلة زوجتك حتى تحرم أمها عليك، لكن الأم و البنت الرضاعيتين لزوجتك تكونان كالأم و البنت النسبيين لها، فتحرمان عليك، و كذلك حليلة الابن الرضاعي كحليلة الابن النسبي، و حليلة الأب الرضاعي كحليلة الأب النسبي، تحرم

Problem # 8. For the realization of the prohibited foster relationship the involvement of fosterage in it is sufficient in general. This relationship is sometimes achieved without the involvement of other relationships in it as the relationship of fatherhood, motherhood, the relationship of a son or daughter created between the husband, the nurse and the foster child, as well as the one created between him and the foster Principal consanguines of the foster father and mother, as when there are foster father and mother of both of them in which case they shall be the foster grandfather and grandmother of the foster child by mere fosterage.

This relationship is sometimes created by the involvement of consanguinity in its creation as the relationship of brotherhood created between the foster child and the consanguine children of the nurse and he nurse's husband, who though related to their parents by birth, yet their relationship of brotherhood with the foster child is created merely by fosterage, so they are the foster brother and sister of the foster child.

It may be remembered here that the relation between two persons is sometimes created by means of a single link, as the relation between a son and his parents. Sometimes it is created by means of two links, as the relation between two brothers, as it is created by means of the link of each of them with their father or mother or both, or the relation between a person and his closest grandfather, as, it is created, for example, by the link between him and his father, or the link between his father and grandfather.

Sometimes it is created by three links, as the relation between a person and his second grandfather, or the relation between a person and his closest uncle, as it is created by the link, for example, between him and his father and the link between his father and his brother each with the father of both of them. Thus rises, declines and splits the consanguine relationship by the reduction and increase in the links, so that sometimes there exists relation between two person by more or less ten links.

Once it has become clear, it must be remembered that all these links are created by birth, it is called a consanguine link, and if all or some, even if one of the ten links is created by fosterage, it shall be called a foster link.

Problem # 9. If *Muṣāharah*, that is one of the causes of prohibition of marriage as explained later, is the link between one of two spouses and the close relatives of the other, it is based on two things, namely mutual marital relationship and the kinship, and fosterage is the substitute of the latter one, namely, kinship and not of the former. So the nurse of one's child shall not be tantamount to his wife so that her mother should be prohibited to him, but the foster mother and daughter of one's wife are like her real

الأولى على أبيه الرضاعي، و الثانية على ابنه الرضاعي.

مسألة ١٠ ـ قد تبين مما سبق أن العلاقة الرضاعية المحضة قد تحصل برضاع واحد كالحاصلة بين المرتضع و بين المرضعة و صاحب اللبن، و قد تحصل برضاعين كالحاصلة بين المرتضع و بين أبوي الفحل و المرضعة الرضاعيين، و قد تحصل برضاعات متعددة، فاذا كان لصاحب اللبن مثلا أب من جهة الرضاع و كان لذلك الأب الرضاعي أيضاً أب من الرضاع و كان للأخير أيضاً أب من الرضاع و هكذا إلى عشرة آباء مثلاً كان الجميع أجداداً رضاعيين للمرتضع الأخير، و جميع المرضعات جدات له، فان كانت أنثى حرمت على جميع الأجداد، و إن كان ذكراً حرمت عليه جميع الجدات، بل لو كانت للجد الرضاعي الأعلى أخت رضاعية حرمت على المرتضع الأخير، لكونها عمته العليا من الرضاع، ولو كانت للمرضعة الأبعد التي هي الجدة العليا للمرتضع أخت حرمت عليه لكونها خالته العليا من الرضاع.

مسألة ١١ ـ قد عرفت فيما سبق أنه يشترط في حصول الأخوة الرضاعية بين المرتضعين اتحاد الفحل، و يتفرع على ذلك مراعاة هذا الشرط في العمومة و الخؤولة الحاصلتين بالرضاع أيضاً، لأن العم والعمة أخ و أخت للأب، والخال و الخالة أخ و أخت للأم، فلو تراضع أبوك أو أمك مع صبية من امرأة فان اتحد الفحل كانت الصبية عمتك أو خالتك من الرضاعة بخلاف ما إذا لم يتحد، فحيث لم تحصل الأخوة الرضاعية بين أبيك أو أمك مع الصبية لم تكن هي عمتك أو خالتك، فلم تحرم عليك.

مسألة ١٢ ـ لا يجوز أن ينكح أبو المرتضع في أولاد صاحب اللبن ولادة بل و رضاعاً على الأحوط، و كذا في أولاد المرضعة نسباً لارضاعاً، و أما أولاده الذين لم يرتضعوا من هذا اللبن فيجوز نكاحهم في أولاد صاحب اللبن و في أولاد المرضعة التي أرضعت أخاهم و إن كان الاحتياط لا ينبغي تركه.

مسألة ١٣ ـ إذا أرضعت امرأة ابن شخص بلبن فحلها ثم أرضعت بنت

mother and daughter, and they are prohibited to the husband. So is the *Ḥalīlah* of one's foster son like the *Ḥalīlah* of his real son and the *Ḥalīlah* of a foster father like the ḥ *alīlah* of his real father, the former being prohibited to his foster father and the latter to his foster son.

Problem # 10. It has become clear from what has already been explained that the link by mere fosterage is sometimes created by a single fosterage as the one created between a foster child and the nurse and the master of the milk [i.e., her husband).Sometimes it is created by two foster relations as the one created between the foster child and the foster parents of the nurse and her husband. Sometimes it is created by several fosterages. Sometimes it is created by several foster relations. So, suppose, if the master of the milk [i.e.., the nurse's husband] has a foster father, and that foster father has also a foster father, and the last foster father also has a foster father, and so on, suppose, there are ten foster fathers, they shall all be the foster grandfathers of the foster child, and all the foster nurses his foster grandmothers. If it were a female, it would be prohibited to all the foster grandfathers, and if it were a male, all the foster grandmothers shall be prohibited to him.

Rather, if the highest foster grandfather had a foster sister, she would also be prohibited to the foster child, being his remotest foster paternal aunt. If the remotest nurse, namely, the remotest foster grandmother of the foster child had a sister, she would also be rendered prohibited to the foster child due to her being the remotest foster maternal aunt.

Problem # 11. It has been understood from what has already been explained, that it is a condition for the creation of foster relationship between two foster children that the husband of their nurse must be the same.

This condition shall also be observed in the relationship of maternal or paternal uncles and aunts created by fosterage, as one's paternal uncle and aunt are the brother and sister of the father, and the maternal uncle and aunt are the brother and sister of the mother.

Now, if one's father or mother is suckled along with a baby girl by a nurse, then if there was a single husband of the nurse, that baby girl shall be his foster paternal or maternal aunt, contrary to the case when the nurse's husband is not the same.

So if the foster relationship is not created between his father or mother with the baby girl, she shall not be his paternal or maternal aunt, and so no prohibition shall ensue.

Problem # 12. It is not lawful for the father of the foster child to marry the children of the master of milk [i.e., the nurse's husband] by birth or by fosterage, according to the more cautious opinion, nor the children of the nurse by descent but not by fosterage.

However, as regards the children who have not been suckled by that milk their marriage is allowed with the children of the master of the milk as well as the children of the nurse who suckled their brother, even if caution does not necessitate giving it up.

Problem # 13. If a woman suckles the son of a person on the milk of her husband, and then suckles the

شخص آخر من لبن ذلك الفحل فتلك البنت و إن حرمت على ذلك الابن لكن تحل أخوات كل منهما لإخوة الآخر.

مسألة ١٤ ـ الرضاع المحرم كما يمنع من النكاح لو كان سابقاً يبطله لو حصل لاحقاً، فلو كانت له زوجة صغيرة فأرضعتها بنته أو أمه أو أخته أو بنت أخيه أو بنت أخته أو زوجة أخيه بلبنه رضاعاً كاملاً بطل نكاحها و حرمت عليه، لصيرورتها بالرضاع بنتاً أو أختاً أو بنت أخ أو بنت أخت له، فحرمت عليه لا حقاً كما كانت تحرم عليه سابقاً، و كذا لو كانت له زوجتان صغيرة و كبيرة فأرضعت الكبيرة الصغيرة حرمت عليه الكبيرة، لأنها صارت أم زوجته، و كذلك الصغيرة إن كانت رضاعها من لبنه أو دخل بالكبيرة لكونها بنتاً له في الأول و بنت زوجته المدخول بها في الثاني نعم ينفسخ عقدها و إن لم يكن الرضاع من لبنه و لم يدخل بالكبيرة و إن لم تحرم عليه.

تنبيه:

إذا كان أخوان في بيت واحد مثلاً و كانت زوجة كل منهما أجنبية عن الآخر و أرادا أن تصير زوجة كل منهما من محارم الآخر حتى يحل له النظر إليها يمكن لهما الاحتيال بأن يتزوج كل منهما بصبية و ترضع زوجة كل منهما زوجة الآخر رضاعاً كاملاً، فتصير زوجة كل منهما أما لزوجة الآخر، فتصير من محارمه، و حل نظره إليها، و بطل نكاح كلتا الصبيتين لصيرورة كل منهما بالرضاع بنت أخي زوجها.

مسألة ١ ـ اذا أرضعت امرأة ولد بنتها و بعبارة أخرى أرضعت الولد جدته من طرف الأم حرمت بنتها أم الولد على زوجها، و بطل نكاحها، سواء أرضعته بلبن أبي البنت أو بلبن غيره، و ذلك لأن زوج البنت أب للمرتضع، و زوجته بنت للمرضعة جدة الولد، و قد مر أنه يحرم على أبي المرتضع نكاح أولاد المرضعة، فاذا

daughter of another man on the same milk of the same husband, then although that girl shall be prohibited to that boy, yet the brothers and sisters of each of them shall be lawful to each other.

Problem # 14. Fosterage that is a cause of prohibition as it prohibits marriage if it is precedent, so also it dissolves the marriage if it takes place subsequently.

So if a person has an infant wife and his daughter, mother, sister, brother's daughter, his sister's daughter or his brother's wife should suckle her for the complete number of suckling acts, her marriage shall be invalidated and she shall be rendered unlawful to him by becoming his daughter, sister, brother's daughter or sister's daughter. So she would be rendered unlawful to him subsequently in the same way as she would have become unlawful previously.

Similarly, if a man had two wives, infant and adult, and the adult one should suckle the infant one, the adult one shall be rendered unlawful to him, as she would become the mother of his wife, and, likewise, his infant wife would also be rendered unlawful to him if the adult wife has suckled her on his milk or has consummated with the adult wife, as in the first case she would become his daughter and the daughter of his consummated wife in the second.

Of course, her contract shall be dissolved, even if the adult wife has not suckled her on his milk and he has not consummated with the adult wife and even if she is not rendered unlawful to him.

Caution

If, suppose, two brothers are living in the same house, and the wife of each of them is stranger to the other, and both of them intend to make each of them *Maḥram* (within prohibited degree of marriage)to the other so that it would be lawful for him to look at her, it is possible to resort to a way-out that each of them should marry an infant girl and each of their wives should suckle the infant wife of the other for a complete number of acts required for prohibition by fosterage, thereby each of them shall become the mother of the other's infant wife, and consequently his *Maḥram*, and so he shall be allowed to look at her.

At the same time the marriage of both the infant girls shall be declared void due to each of them becoming daughter of her wife's brother by fosterage.

Problem # 1. If a woman suckles the child of her daughter, or in other words, suckles the child of his grandmother from the mother's side, her daughter, the mother of that child, shall be rendered unlawful to her husband, and their marriage shall be declared void, irrespective of her suckling on the milk of the daughter's father or on another's milk.

منع منه سابقاً أبطله لا حقاً، و كذا إذا أرضعت زوجة أبي البنت من لبنه ولد البنت بطل نكاح البنت، لما مر من أنه يحرم نكاح أبي المرتضع في أولاد صاحب اللبن، و أما الجدة من طرف الأب إذا أرضعت ولد ابنها فلا يترتب عليه شيء، كما أنه لو كان رضاع الجدة من طرف الأم ولد بنتها بعد وفاة بنتها أو طلاقها أو وفاة زوجها لم يترتب عليه شيء، فلا مانع منه و إن يترتب عليه حرمة نكاح المطلقة و أختها وكذا أخت المتوفاة.

مسألة ٢ ـ لو زوّج ابنه الصغير بابنة أخيه الصغيرة ثم أرضعت جدتها من طرف الأب أو الأم أحدهما و ذلك فيما إذا تزوج الأخوان الأختين انفسخ نكاحهما، لأن المرتضع إن كان هو الذكر فان أرضعته جدته من طرف الأب صار عماً لزوجته، و إن أرضعته جدته من طرف الأم صار خالا لزوجته، و إن كان هو الأنثى صارت هي عمة لزوجها على الأول و خالة له على الثاني، فبطل النكاح على أي حال.

مسألة ٣ ـ إذا حصل الرضاع الطارىء المبطل للنكاح فإما أن يبطل نكاح المرضعة بارضاعها كما في إرضاع الزوجة الكبيرة لشخص زوجته الصغيرة بالنسبة إلى نكاحها و إما أن يبطل نكاح المرتضعة كالمثال بالنسبة إلى نكاح الصغيرة، و إما أن يبطل نكاح غيرهما كما في إرضاع الجدة من طرف الأم ولد بنتها، و الظاهر بقاء استحقاق الزوجة للمهر في الجميع إلا في الصورة الأولى فيما إذا كان الارضاع و انفساخ العقد قبل الدخول، فان فيها تأملاً، فالأحوط التخلص بالصلح، بل الأحوط ذلك في جميع الصور و إن كان الاستحقاق أقرب، و هل تضمن المرضعة مايغرمه الزوج من المهر قبل الدخول فيما إذا كان إرضاعها مبطلاً لنكاح غيرها؟ قولان، أقواهما العدم، و الأحوط التصالح.

مسألة ٤ ـ قد سبق أن العناوين المحرمة من جهة الولادة و النسب سبعة: الأمهات و البنات و الأخوات و العمات والخالات و بنات الأخ و بنات الأخت، فان حصل بسبب الرضاع أحد هذه العناوين كان محرماً كالحاصل

It is due to the fact that the husband of the daughter is the father of the foster child, and his wife is the daughter of the nurse, the grandmother of the foster child, and it has already been mentioned that it is unlawful on the father of a foster child to marry the nurse's children, as it is forbidden previously, it is invalidated subsequently.

Similarly, if the wife of the daughter's father suckles her daughter's child, the daughter's marriage shall be declared void, due to what has already been mentioned that it is unlawful for the father of the foster child to marry the children of the master of the milk [i.e., nurse's husband].

If, however, the paternal grandmother suckles his son's child, no adverse effect shall ensue, in the same way if the maternal grandmother would have suckled her daughter's child after the death of her daughter or her divorce or death of her husband, no adverse effect would have ensued, and there is no objection in it, even if his marriage would be consequently unlawful to the divorcee, her sister and likewise the sister of the deceased woman.

Problem # 2. If the infant son of a person marries the infant daughter of his brother, and then the paternal or maternal grandmother of both of them should suckle one of them , and that is the case when both the brothers should have married two sisters, the marriage of both of them shall be declared void, as in case the foster child were a male and it is suckled by its paternal grandmother, it would become paternal uncle of its wife, and if it is suckled by its maternal grandmother, it would become the maternal uncle of his wife. If, however, it were a female child, she would become the paternal aunt of her husband in the first case, and his maternal aunt in the second. In each case the marriage shall be declared void.

Problem # 3. If a subsequent fosterage takes place that would invalidate marriage, then either the marriage of the nurse shall be invalidated by her suckling as in case of the suckling of a person's infant wife by his adult wife with regard to her marriage[that would be consequently declared void], the marriage of the foster infant shall be declared void, as in case of the marriage of the infant girl, or the marriage of other than both of them shall be declared void, as in case of suckling of the daughter's child by the maternal grandmother. Apparently in all such cases the wife shall be entitled to her dower, except in the first case if eh suckling and dissolution of the marriage take place before consummation of the marriage, in which case there is hesitation, and so it is more cautious to reach compromise, rather it is so in all these cases according to the more cautious opinion, though the entitlement to dower shall be closer to the traditional authority. Now, whether the nurse shall be held responsible for the payment of the penalty of dower by her husband before consummation if her suckling has caused the invalidation of the marriage of some one else, there are two opinion,, the stronger being in favour of absence of such responsibility, though it is more cautious to reach a compromise.

Problem # 4. It has already been mentioned that there are seven prohibited classes on account of birth and consanguinity, namely, the mothers, daughters, sisters, paternal and maternal aunts, brother's daughters and sister's daughters.

If any of these classes are involved due to fosterage, it will be prohibited as due to birth. By what has already been mentioned the detailed procedure of its realization by fosterage has already

بالولادة، و قد عرفت فيما سبق كيفية حصولها بالرضاع مفصلاً، و أما لو لم يحصل بسببه أحد تلك العناوين السبعة لكن حصل عنوان خاص لو كان حاصلاً بالولادة لكان ملازماً و متحداً مع أحد تلك العناوين السبعة ـ كما لو أرضعت امرأة ولد بنتها فصارت أم ولد بنتها، و أم ولد البنت ليست من تلك السبع، لكن لو كانت أمومة ولد البنت بالولادة كانت بنتاً له، والبنت من المحرمات السبعة ـ فهل مثل هذا الرضاع أيضاً محرم، فتكون مرضعة ولد البنت كالبنت أم لا؟ الحق هو الثاني، و قيل بالأول، و هذا هو الذي اشتهر في الألسنة بعموم المنزلة الذي ذهب إليه بعض الأجلة، و لنذكر لذلك أمثلة:

أحدها: زوجتك أرضعت بلبنك أخاها فصار ولدك . و زوجتك أخت له، فهل تحرم عليك من جهة أن أخت ولدك إما بنتك أو ربيبتك، و هما محرمتان عليك، و زوجتك بمنزلتهما أم لا؟ فمن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا .

ثانيها: زوجتك أرضعت بلبنك ابن أخيها فصار ولدك . وهي عمته، و عمة ولدك حرام عليك لأنها أختك، فهل تحرم من الرضاع أم لا فمن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا .

ثالثها: زوجتك أرضعت عمها أو عمتها أو خالها أو خالتها فصارت أمهم، و أم عم و أم عمة زوجتك حرام عليك حيث أنها جدتها من الأب، و كذا أم خال، و أم خالة زوجتك حرام عليك، حيث أنها جدتها من الأم، فهل تحرم عليك من جهة الرضاع أم لا؟ فمن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا .

رابعها: زوجتك ارضعت بلبنك ولد عمها او ولد خالها فصرت ابا ابن عمها او ابا ابن خالها، وهي تحرم على ابي ابن عمها و ابي ابن خالها، لكونهما عمها و خالها، فهل تحرم عليك من جهة الرضاع ام لا؟ فمن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا .

been understood. If it is not realized due to one of the seven classes, but has been realized in a particular class that had it been realized by birth, it would have been binding and connected with one of those seven classes, as in case a woman suckles the infant of her daughter, she becomes the mother of her daughter's child, but a mother of a daughters child is not one of those classes.

If, however, the motherhood of the daughter's child would have been by birth, she would have been his daughter, and a daughter is one of the prohibited classes. Then is such a fosterage also prohibited in which the nurse of a daughter's child shall be like a daughter or not ? In fact, it would be the latter, though some jurists favour the former.

This is the opinion that has been on the tongue of the laity, and has also been held by some of the leading jurists. We are mentioning some of its examples here.

First Example. One's wife suckles her brother on his milk, and thereby he becomes his child, while his wife is the child's sister. Then is she rendered unlawful to him due to the sister of his child becoming his daughter or his *Rabībah* (a girl brought up by a person) , and as both of them are prohibited to him, then is his wife in their situation or not? Those who are in favour of the general application of the laws of prohibition to the situation, give reply in the affirmative, while those in favour of the absence of such application reply in the negative.

Second Example. One's wife suckles the son of her brother on his milk, thereby he becomes his child, while she is his paternal aunt, and paternal aunt of his child is prohibited to him due her being his sister. Now, in this situation is she rendered unlawful by fosterage or not? Those in favour of the general application of the laws of prohibition to such situation reply in the affirmative, while those in favour of absence of such application reply in the negative.

Third Example. One's wife suckles her paternal or maternal uncle or aunt, she thereby becomes their mother, but the mother of the paternal uncle or aunt of his wife is unlawful to him as she is her paternal grandmother, and likewise the mother of the maternal uncle or aunt of his wife is also unlawful to him, as she would be her maternal grandmother.Now, in such situation is she prohibited to him by fosterage or not? Those who are in favour of the general application of the laws of prohibition to such situation reply in the affirmative, while those favour its absence reply in the negative.

Fourth Example. If one's wife suckles the infant child of her paternal or maternal uncle, he becomes the father of the son of her paternal or maternal uncle, and she is prohibited to the father of the son of her paternal or maternal uncle, as both of them are her paternal or maternal uncle.
Now, in such situation is she rendered unlawful to him by fosterage or not? Those who favour the application of the laws of prohibition to such situation reply it in the affirmative, while those who favour

خامسها: امرأة أرضعت أخاك أو أختك لأبو يك فصارت أماً لهما، وهي محرمة في النسب لأنها ام لك ، فهل تحرم عليك من جهة الرضاع و يبطل نكاح المرضعة إن كانت زوجتك ام لا؟ فن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا.

سادسها: امرأة ارضعت ولد بنتك فصارت أماً له، فهل تحرم عليك لكونها بمنزلة بنتك ، و إن كانت المرضعة زوجتك بطل نكاحها أم لا؟ فن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا.

سابعها: امرأة أرضعت ولد أختك فصارت أماً له، فهل تحرم عليك من جهة أن أم ولد الأخت حرام عليك ، لأنها أختك ، و إن كانت المرضعة زوجتك بطل نكاحها أم لا؟ فن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا.

ثامنها: امرأة أرضعت عمك أو عمتك أو خالك أو خالتك فصارت أمهم، و أم عمك و عمتك نسباً تحرم عليك ، لأنها جدتك من طرف أبيك ، و كذا أم خالك و خالتك ، لأنها جدتك من طرف الأم، فهل تحرم عليك بسبب الرضاع، و إن كانت المرضعة زوجتك بطل نكاحها أم لا؟ فن قال بعموم المنزلة يقول: نعم، و من قال بالعدم يقول: لا.

مسألة ٥ ـ لو شك في وقوع الرضاع أو في حصول بعض شروطه من الكمية أو الكيفية بنى على العدم، نعم يشكل فيا لو علم بوقوع الرضاع بشروطه و لم يعلم بوقوعه في الحولين أو بعدهما و علم تاريخ الرضاع و جهل تاريخ ولادة المرتضع، فحينئذ لا يترك الاحتياط.

مسألة ٦ ـ لا تقبل الشهادة على الرضاع إلا مفصلة بأن يشهد الشهود على الارتضاع في الحولين بالامتصاص من الثدي خمس عشرة رضعة متواليات مثلاً إلى آخر ما مر من الشروط، و لا يكفي الشهادة المطلقة و المجملة بأن يشهد على وقوع الرضاع المحرم، أو يشهد مثلاً على أن فلاناً ولد فلانة أو فلانة بنت فلان من الرضاع، بل يسأل منه التفصيل، نعم لو علم عرفانها شرائط الرضاع و أنها

its absence reply in the negative.

Fifth Example. A woman suckles a person's brother or consanguine sister, she becomes the mother of both of them, and she is prohibited by consanguinity to him as she becomes her mother. Then is she prohibited to her husband by fosterage, and if she happens to be his wife, is the marriage of the nurse declared void or not? Those who favour the application of the laws of prohibition to such situation reply it the affirmative, while those who favour the absence of it reply in the negative.

Sixth Example. A woman suckles the child of a man's daughter, and thereby becomes its mother. Is the woman rendered unlawful to him due to fact that the child becomes equal to his daughter? If the woman happens to be his wife, is her marriage declared void or not? Those who favour the application of the laws of prohibition to such situation reply in the affirmative, while those who favour absence of it reply in the negative.

Seventh Example. A woman suckles the child of one's sister, and thereby becomes its mother. Is she then rendered unlawful to him as the mother of his sister's child prohibited to him, as she is his sister. If the woman happens to be his wife, is her marriage rendered void or not? Those who favour the application of the laws of prohibition to such situation reply in the affirmative, while those who favour the absence of it reply in the negative.

Eighth Example. A woman suckles one's paternal or maternal uncle or aunt, and thereby becomes their mother. But the mother of his paternal uncle or aunt is prohibited to him by consanguinity, as she would be his paternal grandmother. Likewise, the mother of maternal uncle or aunt is prohibited to him, as would be his maternal grandmother. Then is the woman rendered unlawful to that man by fosterage, and if the nurse happens to his wife, is her marriage declared void, or not? Those who are in favour of the application of the laws of prohibition to such situation reply in the affirmative, while those who are in favour of absence of it reply in the negative.

Problem # 5. If a person has doubt about the creation of the prohibition by fosterage or the fulfilment of some of its required conditions relating to the quantity or procedure, the decision shall be in favour of its absence. Of course, there shall be hesitation in case he knows about the completion of fosterage with the fulfilment of its required conditions, but does not know whether it has taken place within two years period or after it. He knows the date of suckling, but is ignorant of the date of birth of the foster child. In such case caution must not be given up.

Problem # 6. No evidence is accepted in a case of fosterage, except when it is detailed, so that the witnesses must testify that the suckling has taken place within a period of two years by the infant sucking from the breast of the nurse, for example, fifteen continuous acts of suckling until the end according to the conditions already mentioned. A general and brief testimony is not sufficient as when

موافقان معه في الرأي اجتهاداً أو تقليداً تكفي.

مسألة ٧ ـ الأقوى أنه تقبل شهادة النساء العادلات في الرضاع مستقلات بأن تشهد به أربع نسوة، و منضمات بأن تشهد به امرأتان مع رجل واحد.

مسألة ٨ ـ يستحب أن يختار لرضاع الأولاد المسلمة العاقلة العفيفة الوضيئة ذات الأوصاف الحسنة، فان للبن تأثيراً تاماً في المرتضع كما يشهد به الاختبار و نطقت به الأخبار و الآثار، فعن الباقر عليه السلام قال: «قال رسول الله صلى الله عليه و آله: لا تسترضعوا الحمقاء و العمشاء فإن اللبن يعدي» و عن أميرالمؤمنين عليه السلام «لا تسترضعوا الحمقاء فإن اللبن يغلب الطباع» و عنه عليه السلام «انظروا من ترضع أولادكم فإن الولد يشب عليه» الى غير ذلك من الأخبار المستفاد منها رجحان اختيار ذوات الصفات الحميدة خَلقاً و خُلقاً، و مرجوحية اختيار أضدادهن و كراهته، لا سيما الكافرة، و إن اضطر الى استرضاعها فليختر اليهودية و النصرانية على المشركة و المجوسية، و مع ذلك لا يسلمّ الطفل إليهن، و لا يذهبن بالولد الى بيوتهن، و يمنعها عن شرب الخمر وأكل لحم الخنزير، و مثل الكافرة أو أشد كراهة استرضاع الزانية باللبن الحاصل من الزنا و المرأة المتولدة من زنا، فعن الباقر عليه السلام «لبن اليهودية و النصرانية والمجوسية أحب إليّ من ولدالزنا» و عن الكاظم عليه السلام «سئل عن امرأة زنت هل يصلح أن تسترضع؟ قال: لا يصلح و لا لبن ابنتها التي ولدت من الزنا».

القول في المصاهرة وما يلحق بها

المصاهرة هي علاقة بين أحد الزوجين مع أقرباء الآخر موجبة لحرمة لنكاح عيناً أو جمعاً على تفصيل يأتي.

مسألة ١ ـ تحرم معقودة الأب على ابنه و بالعكس فصاعداً في الأول و نازلاً

the witness testifies to the creation of prohibitive fosterage or, for example, testifies that such and such person is the son of such and such or such and such is the daughter of such and such by fosterage. Rather it is necessary that he should be asked to give details. Of course, if it is known that the two witnesses know the conditions of (prohibition by) fosterage and both of them agree with the opinion by way of *Ijtihād* or *Taqlīd*, it would be sufficient.

Problem # 7. According to the stronger opinion the testimony of just women is accepted in fosterage independently when four women give testimony, or jointly when two just women give testimony in conjunction with a single male.

Problem # 8. It is approved for suckling one's children to select a Muslim, sane, chaste and pure woman possessing desirable qualities, as there is a perfect influence of the milk on the foster child, as is testified by the traditions and reports. So it has been reported from (Imām) al-Bāqir, A.S., that he has said: "The Prophet of Allāh , PBUH, has said : "Do not employ foolish nurses for suckling (your children) or those whose eyes water, as the milk has its effect (on the child)."It has been reported from Amīr al-Mu'minīn (Imām 'Alī), A.S., (saying): "Do not employ foolish nurses for suckling (your children) as the milk overwhelms the natures (and habits of children)."It has also been reported from him, (saying): "Be careful who is suckling your children, because a child grows up under the influence of the milk." Similarly there are other reports indicating preference for the selection of nurses possessing desirable habits physically and morally, and giving greater weight to avoiding those possessing contrary habits and its disapproval, particularly the selection of an infidel woman. In case there is an emergency one must select a Jewish or Christian woman rather than a Polytheist or Majūsī woman. Nevertheless, the infant should not be entrusted to such nurses, and they should not be allowed to take it to their homes. They should also be ordered to abstain from drinking wine and eating pork.

Similar to the infidel women or even stronger is the abhorrence of employing an adulteress to suckle the child on the milk produced by adultery or a woman born of adultery. So it has been reported from (Imām) al-Bāqir, A.S., "The milk of a Jewess, Christian or Majūsī woman is more desirable for me than that of a woman born of adultery." Likewise, it has been reported from (Imām Mūsā) al-Kāẓim who was asked about a woman who has committed adultery whether it is suitable to employ her to suckle a child, to which he replied: "It is not suitable, nor is the milk of a woman born of adultery."

Third Cause of Prohibition - *Muṣāharah* or Affinity

Muṣāharah , or Affinity, is the relation between one of the spouses and he close relatives of the other causing prohibition of marriage independently (*'ainan*) or in conjunction (*jam'an*), according to the details that follow.

Problem # 1. A woman contracted in marriage by the father, how high so ever, is perpetually prohibited

في الثاني حرمة دائمية، سواء كان العقد دائمياً أو انقطاعياً، و سواء دخل العاقد بالمعقودة أم لا، و سواء كان الأب و الابن نسبيين أو رضاعيين.

مسألة ٢ ـ لو عقد على امرأة حرمت عليه أمها و إن علت نسباً أو رضاعاً، سواء دخل بها أم لا، و سواء كان العقد دواماً أو انقطاعاً، و سواء كانت المعقودة صغيرة أو كبيرة، نعم الأحوط في العقد على الصغيرة انقطاعاً أن تكون بالغة إلى حد تقبل للاستمتاع و التلذذ بها ولو بغير الوطء بأن كانت بالغة ست سنين فما فوق مثلاً، أو يدخل في المدة بلوغها إلى هذا الحد، فما تعارف من إيقاع عقد الانقطاع ساعة أو ساعتين على الصغيرة الرضيعة أو من يقاربها مريدين بذلك محرمية أمها على المعقود له لا يخلو من إشكال من جهة الاشكال في صحة مثل هذا العقد حتى يترتب عليه حرمة أم المعقود عليها ، و إن لا يخلو من قرب أيضاً لكن لو عقد كذلك أي الساعة أو الساعتين عليها فلا ينبغي ترك الاحتياط بترتب آثار المصاهرة و عدم المحرمية لو قصد تحقق الزوجية ولو بداعي بعض الآثار كالمحرمية.

مسألة ٣ ـ لو عقد على امرأة حرمت عليه بنتها و إن نزلت إذا دخل بالأم ولو دبراً، و أما إذا لم يدخل بها لم تحرم عليه بنتها عيناً، و انما تحرم عليه جمعاً بمعنى أنها تحرم عليه مادامت الأم في حباله، فاذا خرجت بموت أو طلاق أو غير ذلك جاز له نكاحها.

مسألة ٤ ـ لا فرق في حرمة بنت الزوجة بين أن تكون موجودة في زمان زوجية الأم أو تولدت بعد خروجها عن الزوجية، فلو عقد على امرأة و دخل بها ثم طلقها ثم تزوجت و ولدت من الزوج الثاني بنتاً تحرم هذه البنت على الزوج الأول.

مسألة ٥ ـ لا إشكال في ترتب الحرمات الأربع على النكاح والوطء الصحيحين، و هل تترتب على الزنا و وطء الشبهة أم لا؟ قولان، أحوطهما و أشهر هما أولهما، فلو زنى بامرأة حرمت على أبي الزاني و حرمت على الزاني أم

to his son, how low so ever, irrespective of the marriage being permanent or temporary, and whether the person contracting the marriage has enjoyed the woman so contracted in marriage or not, and whether the father and the son are related by consanguinity or fosterage.

Problem # 2. If a man contracts marriage with a woman, her mother, how high so ever, by consanguinity or fosterage, is rendered unlawful to him, irrespective of whether his marriage has been consummated with her or not, and whether the marriage were permanent or temporary, and whether the woman so contracted in marriage were a minor or an adult. Of course, to be more cautious in case of a temporary marriage contracted with a minor, she should have reached an age when she is capable of being enjoyed or with whom one may have pleasure even without having sexual intercourse, so that she must have attained the age of, suppose, six years, or should have attained such age during the period of the temporary marriage. As regards the conclusion of temporary marriage for an hour or two with a suckling female infant or one about her age intending thereby to render her mother a *Maḥram* to the person contracting the marriage, it is not free from ambiguity due to the doubt in the validity of such a contract not to speak of creating prohibition of the mother of the infant whose marriage is contracted to the man, though it is not free being close to creating prohibition, yet if the marriage is contract in that manner with that infant for an hour or two, caution must not be e given up in creating the effects of *Muṣāharah* or Affinity and absence of rendering her mother *Mahram* to the man if the marriage was contracted with the intention of marital tie and the consequent effects such as rendering her mother *Maḥram* to the man.

Problem # 3. If a man contracts marriage with a woman, her daughter, how low so ever, is thereby rendered unlawful to him provided that he has enjoyed the mother, even if unnaturally [i.e. from her backside]. If, however, he has not enjoyed the mother, her daughter alone (*ainan*) shall not be rendered unlawful to him, but shall be unlawful in conjunction (*jam'an*), i.e., she shall remain unlawful to him as long as her mother is in his wedlock. So if she is released from his wedlock by her death, divorce or the like, it shall be lawful for the man to contract marriage with her.

Problem # 4. Thee is no difference in the prohibition of the wife's daughter whether she existed during the subsistence of the marital tie of her mother or was born after her release from the wedlock. So if a man marries a woman and consummates with her, and then divorces her, and then the woman marries another man and a daughter is born to her from the second husband, that daughter shall be unlawful for the first husband.

Problem # 5. There is no objection in the creation of the four prohibitions after the conclusion of valid marriage and sexual intercourse. As regards the question whether such effects ensue in case of performance of an illicit intercourse or an intercourse under a semblance of right, thee are two opinions, the more cautious and more prevalent is in favour of the former. So if a man has had illicit intercourse

المزني بها و بنتها و كذلك الموطوءة بالشبهة، نعم الزنا الطارىء على التزويج لا يوجب الحرمة سواء كان بعد الوطء أو قبله، فلو تزوج بامرأة ثم زنى بأمها أو بنتها لم تحرم عليه امرأته، و كذا لو زنى الأب بامرأة الابن لم تحرم على الابن، أو زنى الابن بامرأة الأب لم تحرم على أبيه.

مسألة ٦ ـ لا فرق في الحكم بين الزنا في القبل أو الدبر و كذا في الشبهة.

مسألة ٧ ـ إذا علم بالزنا و شك في كونه سابقا على العقد أو طارئاً بنى على صحته.

مسألة ٨ ـ لو لمس امرأة أجنبية أو نظر إليها بشهوة لم تحرم الملموسة و المنظورة على أبي اللامس و الناظر و ابنهما، و لا تحرم أم المنظورة و الملموسة على الناظر واللامس، نعم لو كانت للأب جارية ملموسة بشهوة أو منظورة إلى ما لا يحل النظر اليه لغيره إن كان نظره بشهوة أو نظر إلى فرجها ولو بغير شهوة حرمت على ابنه، و كذا العكس على الأقوى.

مسألة ٩ ـ لا يجوز نكاح بنت الأخ على العمة و بنت الأخت على الخالة إلا باذنهما، من غير فرق بين كون النكاحين دائمين أو منقطعين أو مختلفين، و لا بين علم العمة والخالة حال العقد و جهلهما، و لا بين اطلاعهما على ذلك و عدمه أبداً، فلو تزوجهما عليهما بدون إذنهما كان العقد الطارىء كالفضولي على الأقوى تتوقف صحته على إجازتهما، فإن أجازتا جاز، و إلا بطل، و يجوز نكاح العمة و الخالة على بنتي الأخ و الأخت و إن كانت العمة والخالة جاهلتين، و ليس لهما الخيار لا في فسخ عقد أنفسهما و لا في فسخ عقد بنتي الأخ و الأخت على الأقوى.

مسألة ١٠ ـ الظاهر أنه لا فرق في العمة و الخالة بين الدنيا منهما و العليا، كما أنه لا فرق بين نسبيتين منهما و الرضاعيتين.

مسألة ١١ ـ إذا أذنتا ثم رجعتا عن الاذن فان كان الرجوع بعد العقد لم يؤثر في البطلان، و إن كان قبله بطل الاذن السابق، فلو لم يبلغه الرجوع و تزوج

with a woman, she shall be rendered unlawful to the father of the fornicator, and the mother and daughter of the woman with whom he has had illicit intercourse shall be rendered unlawful to him. The same law is applicable to a woman enjoyed under a semblance of right. Of course, an illicit intercourse performed subsequent to marriage shall not incur prohibition, regardless of it having been committed before or after consummation with the wife. So if a man marries a woman and then commits illicit intercourse with her mother or daughter, his wife shall not thereby be rendered unlawful to him. Likewise, if the father commits illicit intercourse with the wife of his son, she shall not be rendered unlawful to the son, or if the son commits illicit intercourse with the wife of his father, she shall not be rendered unlawful to the father.

Problem # 6. There is no difference in the application of the law whether the illicit intercourse is performed in the natural or unnatural manner [i.e., from the front or backside of the woman]. The same law is application in case of the intercourse performed under a semblance of right.

Problem # 7. If a man knows about the *Zinā'*, but doubts whether it was performed previous or subsequent to the contract of marriage, the marriage shall be declared valid..

Problem # 8. If a man touches a stranger woman or glances at her lasciviously, she is not thereby rendered unlawful to the father or son of such person, nor is the woman rendered unlawful to such person. If, however, there is slave-girl touched lasciviously or glanced at in a way as it is not lawful for a stranger to do so, in case his glance was lustful or he has looked at her female organ even without lust, she would be rendered unlawful to his son, and so is vice versa, according to the stronger opinion.

Problem # 9. It is not lawful to marry the brother's daughter after marrying her paternal aunt or the sister's daughter after her maternal aunt except with her permission, without there being any difference whether both the marriages were permanent or temporary or different from each other, and whether the paternal or maternal aunt knew about the marriage of their niece or both were ignorant of it, or whether both of them had information about it or no information at all. If a man marries either of them after marrying their paternal or maternal aunt without their permission, the subsequent marriage shall be treated like one contracted by an unauthorized person and its validity shall hang in abeyance until assented to by them, so that if they assent to it, it shall be lawful, otherwise it shall be declared void. However, it is lawful to marry the paternal or maternal aunt after the marriage of their brother's or sisters daughter, if the paternal or maternal aunt was ignorant, and they shall have no right of option for dissolving their own marriage or the marriage of their brother's or sister's daughter, according to the stronger opinion.

Problem # 10. Apparently it makes no difference whether the paternal or maternal aunt were of a lower or higher degree, as also whether they were related by descent or fosterage.

Problem # 11. If the paternal or maternal aunt gives her consent and subsequently withdraws it, then if it were after the conclusion of the marriage, it would not be effective in voidance of the marriage contract. If, however, it was prior to the conclusion of the marriage contract, the previous consent shall be declared null and void. If the withdrawal of her consent has not reached the man, and he contracts marriage, the validity of the contract shall hang in abeyance until assented to subsequently by the

توقف صحته على الاجازة اللاحقة.

مسألة ١٢ ـ الظاهر أن اعتبار إذنهما ليس حقاً لهما كالخيار حتى يسقط بالاسقاط، فلو اشترط في ضمن عقدهما أن لا يكون لهما ذلك لم يؤثر شيئاً، ولو اشترط عليهما أن يكون للزوج العقد على بنت الأخ أو الأخت فالظاهر كون قبول هذا الشرط إذناً، نعم لو رجع عنه قبل العقد لم يصح العقد، ولو شرط أن له ذلك ولو مع الرجوع بحيث يرجع إلى إسقاط إذنه فالظاهر بطلان الشرط.

مسألة ١٣ ـ لو تزوج بالعمة و ابنة الأخ و الخالة و بنت الأخت و شك في السابق منهما حكم بصحة العقدين، و كذلك فيما إذا تزوج ببنت الأخ أو الأخت و شك في أنه كان عن إذن من العمة أو الخالة أم لا حكم بالصحة.

مسألة ١٤ ـ لو طلق العمة أو الخالة فان كان بائناً صح العقد على بنتي الأخ و الأخت بمجرد الطلاق، و ان كان رجعياً لم يجز بلا إذن منهما إلا بعد انقضاء العدة.

مسألة ١٥ ـ لا يجوز الجمع في النكاح بين الأختين نسبيتين أو رضاعيتين دواماً أو انقطاعاً أو بالاختلاف، فلو تزوج باحدى الأختين ثم تزوج بأخرى بطل العقد الثاني دون الأول، سواء دخل بالأولى أولا، ولو اقترن عقدهما بأن تزوجهما بعقد واحد أو في زمان واحد بطلا معاً.

مسألة ١٦ ـ لو تزوج بالأختين ولم يعلم السابق و اللاحق فان علم تاريخ أحدهما حكم بصحته دون الآخر، و إن جهل تاريخهما فان احتمل تقارنهما حكم ببطلانهما معاً، و إن علم عدم الاقتران فقد علم إجمالاً بصحة أحدهما و بطلان الآخر، فلا يجوز له عمل الزوجية بالنسبة إليهما أو إلى إحداهما مادام الاشتباه، و الأقوى تعيين السابق بالقرعة، لكن الأحوط أن يطلقهما أو يطلق الزوجة الواقعية منهما ثم يزوج من شاء منهما، و له أن يطلق إحداهما و يجدد العقد على الأخرى بعد انقضاء عدة الأولى إن كانت مدخولاً بها.

مسألة ١٧ ـ لو طلقهما و الحال هذه فإن كان قبل الدخول فعليه للزوجة

paternal or maternal aunt.

Problem # 12. Apparently the condition of the consent of the paternal or maternal aunt is not a right like the right of option that is eliminated by being dropped. So if it is stipulated in the contract of either of them that they shall have no right of option, it shall have no effect. If, however, it is stipulated by them that the husband shall be entitled to contract marriage with their brother's or sister's daughter, apparently this stipulation shall be treated as consent. Of course, if they withdraw their consent before the conclusion of marriage with their brother's or sister's daughter, the subsequent marriage shall not be valid. If it is stipulated that the husband shall be entitled to marry their brother's or sister's daughter despite their withdrawal of permission amounting to elimination of their right , then apparently such stipulation shall be null and void.

Problem # 13. If a man marries the paternal aunt and her brother's daughter and the maternal aunt and her sister's daughter, but doubts as to which of them was prior in date, judgement shall be given in the validity of both the contracts. Likewise, if a man marries the brother' or sister's daughter, but doubts whether it was with the permission of the paternal or maternal aunt, judgement shall be given in favour of the validity of the contract.

Problem # 14. If a man divorces the paternal or maternal aunt, then if it were irrevocable, the marriage with their brother's or sister's daughter contracted immediately after the divorce shall be valid. If, however, it were revocable, it shall not be valid without their consent, except after the expiry of their *'Iddah*.

Problem # 15. It is not lawful to marry two sisters together, irrespective of their being related by consanguinity or fosterage and whether they are both married permanently or temporarily or differently. So if a man marries one of the sisters and then marries another, the second contract shall be declared void but not the first, regardless whether he has consummated the first or not. If the marriage contracts of both of them are simultaneous, as when he has married both of them by a single contract and at the same time, both the contracts shall be declared void.

Problem # 16. If a man contracts marriage with two sisters, but does not know as to which of them is precedent and subsequent, then if he knows the date of one of them, that one shall be declared valid excluding the other. If he was ignorant of the dates of both of them, but there is likelihood of their being simultaneous, both of them shall be declared void. If, however, he knew that they were not concluded simultaneously, but had a brief knowledge about the validity of one of them and the invalidity of the other, he shall not be allowed to treat one or both of them as his wife, as long as the misunderstanding subsists. According to the stronger opinion, he should decide about the precedence by casting lots. However, it is more cautious to divorce both of them or divorce the actual wife, and then marry either of them. He is also allowed to divorce one of them and renew the contract with the other after the expiry of the *'Iddah* of the first if he had consummated the marriage with her.

Problem # 17. If he divorces both of them in such situation, then if it were before consummation, he

الواقعية نصف مهرها، و إن كان بعد الدخول فلها عليه تمام مهرها فإن كان المهران مثليين و اتفقا جنساً و قدراً فقد علم من عليه الحق و مقدار الحق، و انما الاشتباه فيمن له الحق، و في غير ذلك يكون الاشتباه في الحق أيضاً، فإن اصطلحوا بما تسالموا عليه فهو، و إلا فلا محيص إلا عن القرعة، فمن خرجت عليها من الأختين كان لها نصف مهرها المسمى أو تمامه و لم تستحق الأخرى شيئاً، نعم مع الدخول بها تفصيل لا يسعه هذا المختصر.

مسألة ١٨ ـ الظاهر جريان حكم تحريم الجمع فيما إذا كانت الأختان كلتاهما اوإحداهما من زنا.

مسألة ١٩ ـ لو طلق زوجته فإن كان الطلاق رجعياً لا يجوز و لا يصح نكاح أختها ما لم تنقض عدتها، و إن كان بائناً جاز له نكاح أختها في الحال نعم لو كانت متمتعاً بها و انقضت مدتها أو وهبها لايجوز على الأحوط لو لم يكن الأقوى نكاح أختها قبل انقضاء العدة و إن كانت بائنة.

مسألة ٢٠ ـ ذهب بعض الاخباريين إلى حرمة الجمع بين الفاطميتين في النكاح، و الحق جوازه و إن كان الترك أحوط و أولى.

مسألة ٢١ ـ لو زنت امرأة ذات بعل لم تحرم على زوجها، و لا يجب على زوجها أن يطلقها و إن كانت مصرة على ذلك.

مسألة ٢٢ ـ من زنى بذات بعل دواماً أو متعة حرمت عليه أبداً، سواء كانت مسلمة أم لا، مدخولاً بها كانت من زوجها أم لا، فلا يجوز نكاحها بعد موت زوجها أو زوال عقدها بطلاق و نحوه، و لا فرق على الظاهر بين أن يكون الزاني عالماً بأنها ذات بعل أولا، ولو كان مكرهاً على الزنا ففي لحوق الحكم إشكال.

مسألة ٢٣ ـ لو زنى بامراة في العدة الرجعية حرمت عليه أبداً كذات البعل دون البائنة و من في عدة الوفاة، ولو علم بأنها كانت في العدة و لم يعلم بأنها كانت رجعية أو بائنة فلا حرمة، نعم لو علم بكونها في عدة رجعية و شك في انقضائها فالظاهر الحرمة.

shall be liable to pay half the dower to the real wife. If it were after consummation, she shall have her whole dower. If both the dowers were proper ones and of the same kind and amount, then, if he knows who has the liability as well as the quantity of the right, then the misunderstanding shall relate to the rightful one, and in case otherwise the misunderstanding shall also relate to the right. Then if they reach a compromise on their conciliation, well and good; otherwise, the only alternative shall be casting lots. Thus, the one in whose favour the die is cast shall have half of her proper or full dower, while the other shall be entitled to nothing. In case of consummation, there is detailed procedure that cannot be explained in this concise book.

Problem # 18. Apparently the law of prohibition of conjoining two sisters (as wives) shall apply even in case one or both of the sisters are the product of illicit intercourse.

Problem # 19. If a man divorces his wife, then if the divorce were revocable, it shall not be lawful for him to marry her sister as long as the *'Iddah* of the first wife is not over. If, however, the divorce were irrevocable, it shall be lawful for him to marry her sister immediately. Of course, if the first wife were a temporary one, and the period of her marriage has expired or the husband has excused her the remaining period, according to the more cautious, if not stronger, opinion, it shall not be lawful for him to marry her sister before the expiry of her *'Iddah*, even if it were irrevocable.

Problem # 20. Some of the *Akhbārī* jurists have declared it unlawful to conjoin two Faṭimī sisters in marriage, but, in fact, it is lawful, though it is more cautious or preferable to give up conjoining them in marriage.

Problem # 21. If a man has had illicit intercourse with a woman having a husband, she shall not thereby be rendered unlawful to her husband, and her husband is not bound to divorce her, even if she insists on it.

Problem # 22. If a man has had illicit intercourse with a woman having a husband, whether married permanently or temporarily, she shall be rendered perpetually unlawful to the fornicator, irrespective of her being a Muslim or not, and whether her marriage with her husband has been consummated or not. It shall not be lawful for him to marry her even after husband's death or the cessation of her wedlock by divorce or the like. It makes no difference whether the fornicator knows that she has a husband or not. If the man has had illicit intercourse forcibly, then there shall be hesitation in the application the law of prohibition.

Problem # 23. If a man has had illicit intercourse with a woman observing an *'Iddah* for a revocable divorce, she shall be rendered perpetually unlawful to the fornicator like a woman having a husband, excluding one observing *'Iddah* for an irrevocable divorce or one observing an *'Iddah* for husband's

مسألة ٢٤ ـ من لاط بغلام فأوقبه ولو ببعض الحشفة حرمت عليه أبداً أمّ الغلام و إن علت و بنته و إن نزلت و أخته، من غير فرق بين كونهما صغيرين أو كبيرين أو مختلفين، و لا تحرم على المفعول أمّ الفاعل و بنته و أخته على الأقوى، و الأمّ و البنت و الأخت الرضاعيات للمفعول كالنسبيات.

مسألة ٢٥ ـ انما يوجب اللواط حرمة المذكورات إذا كان سابقاً، و أما الطارىء على التزويج فلا يوجبها و لا بطلان النكاح، و لا ينبغي ترك الاحتياط.

مسألة ٢٦ ـ لو شك في تحقق الايقاب حينما عبث بالغلام أو بعده بنى على العدم.

القول في النكاح في العدة وتكميل العدد

مسألة ١ ـ لا يجوز نكاح المرأة لا دائماً و لا منقطعاً إذا كانت في عدة الغير، رجعية كانت أو بائنة، عدة وفاة أو غيرها، من نكاح دائم أو منقطع أو من وطء شبهة، ولو تزوجها فإن كانا عالمين بالموضوع والحكم بأن علما بكونها في العدة و علما بأنه لا يجوز النكاح فيها أو كان أحدهما عالماً بهما بطل النكاح و حرمت عليه أبداً، سواء دخل بها أولا، و كذا إن جهلا بهما أو بأحدهما و دخل بها ولو دبراً، و أما لو لم يدخل بها بطل العقد و لكن لم تحرم عليه أبداً، فله استئناف العقد عليها بعد انقضاء العدة التي كانت فيها.

مسألة ٢ ـ لو وكل أحداً في تزويج امرأة له و لم يعين الزوجة فزوّجه امرأة ذات عدة لم تحرم عليه و إن علم الوكيل بكونها في العدة، و انما تحرم عليه مع الدخول، و أما لو عين الزوجة فإن كان الموكل عالماً بالحكم و الموضوع حرمت عليه ولو كان الوكيل جاهلاً بهما، بخلاف العكس، فالمدار علم الموكل و جهله لا الوكيل.

death, even if he knew that she was observing an *'Iddah*, but did not know whether it was for a revocable or irrevocable divorce, no perpetual prohibition shall ensue. Of course, if he knew that she was observing an *'Iddah* for a revocable divorce, but doubted whether it has expired or not, apparently prohibition shall ensue.

Problem # 24. If a man commits sodomy with a boy by penetrating even a part of glans penis, to him shall be rendered perpetually his mother, how high so ever, his daughter, how low so ever, and his sister without there being difference whether both the perpetrator and victim are minor or adult or one minor and the other an adult. But the mother, daughter and sister of the perpetrator are not rendered unlawful to the victim, according to the stronger opinion. The foster mother, daughter and sister of the victim shall be treated like consanguine ones.

Problem # 25. The prohibitions incurred by sodomy, mentioned in the preceding Problem, shall be effective when the act was precedent to the marriage, but in case of one subsequent to the marriage shall not be effective and no invalidity of the marriage shall ensue, though caution must not be given up.

Problem # 26. If the perpetrator of sodomy doubts at the time of its perpetration or subsequently whether actual penetration has taken place or not, decision shall be made in favour of its absence.

Fourth Cause of Prohibition - Marriage during *'Iddah*

Problem # 1. It is not lawful to contract marriage permanently or temporarily with a woman observing an *'iddah* for another person, whether for a revocable or irrevocable divorce, or for husband's death, etc., after a permanent or temporary marriage or an intercourse under a semblance oi marriage. If the man contracts marriage with her, while both of them knew about the subject and the law so that both of them knew that the marriage was contracted during an *'Iddah* and that it is not lawful to contract marriage during an *'Iddah*, or one of them had such knowledge about both the things, the marriage shall be declared null and void, and she shall be rendered perpetually unlawful to him, irrespective of the marriage having been consummated or not. The same shall be the effect if both of them were ignorant of both or one of the subject and the law, and the man enjoys her even if unnaturally [i.e., from her backside.If, however, the husband has not enjoyed her, the marriage shall be declared void, but she shall not be rendered perpetually unlawful to him, and he shall be allowed to contract marriage *de novo* with her after the completion of the *'Iddah* she was observing.

Problem # 2. If a man appoints an agent to contract marriage with a woman on his behalf without specifying the woman, and the agent contracts marriage with a woman observing *'Iddah*, she shall not thereby be rendered unlawful to him, even if the agent knew about her observing *'Iddah*. If, however, the man consummates marriage with her, she shall thereby be rendered unlawful to him. If the man specifies the woman, then if the client knew about the law and the subject, she shall be rendered unlawful to him, even if the agent was ignorant about the law and the subject, contrary to the case otherwise. So the criterion [for prohibition] is the knowledge and ignorance of the client and not of the agent.

مسألة ٣ ـ لا يلحق بالتزويج في العدة وطء الشبهة أو الزنا بالمعتدة، فلو وطأ شبهة أو زنى بالمرأة في حال عدتها لم يؤثر في الحرمة الأبدية أية عدة كانت إلا العدة الرجعية إذا زنى بها فيها، فانه يوجب الحرمة كما مر.

مسألة ٤ ـ لو كانت المرأة في عدة الرجل جاز له العقد عليها في الحال، و لا ينتظر انقضاء العدة إلا في موارد لموانع طارئة كالطلاق الثالث المحتاج إلى المحلل، و التاسع المحرم ابداً، و فيما إذا كانت معتدة له بالعدة الرجعية يبطل العقد عليها ايضاً، لكونها بمنزلة زوجته، فلو كانت عنده متعة واراد ان يجعل عقدها دواماً جاز ان يهب مدتها و يعقد عليها دواماً في الحال، بخلاف ما إذا كانت عنده زوجة دائمة واراد ان يجعلها منقطعة فطلقها لذلك طلاقاً غير بائن، فانه لا يجوز له ايقاع عقد الانقطاع عليها الا بعد خروجها عن العدة.

مسألة ٥ ـ هل يعتبر في الدخول الذي هو شرط للحرمة الأبدية في صورة الجهل ان يكون في العدة او يكفي وقوع العقد فيها و ان كان الدخول واقعاً بعد انقضائها؟ قولان أحوطهما الثاني، بل لا يخلو من قوة.

مسألة ٦ ـ لو شك في أنها معتدة أم لا حكم بالعدم و جاز له تزويجها و لا يجب عليه الفحص عن حالها، و كذا لو شك في انقضاء عدتها و أخبرت هي بالانقضاء، فتصدق و جاز تزويجها.

مسألة ٧ ـ لو علم أن التزويج كان في العدة مع الجهل موضوعاً أو حكماً و لكن شك في أنه دخل بها حتى تحرم عليه أبداً أولا بنى على عدمه، فلم تحرم عليه، و كذا لو علم بعدم الدخول لكن شك في ان أحدهما قد كان عالماً أولا بنى على عدمه، فلا يحكم بالحرمة الأبدية.

مسألة ٨ ـ يلحق بالتزويج في العدة في إيجاب الحرمة الا بدية التزويج بذات البعل، فلو تزوجها مع العلم بأنها ذات بعل حرمت عليه أبداً سواء دخل بها أم لا، ولو تزوجها مع الجهل لم تحرم عليه إلا مع الدخول بها.

مسألة ٩ ـ لو تزوج بامراة عليها عدة و لم تشرع فيها لعدم تحقق مبدئها كما إذا

Problem # 3. An intercourse under a semblance of right or an illicit intercourse with a woman observing *'Iddah* is not treated at par with a marriage contracted during *'Iddah*. So if a man has had an intercourse under a semblance of right or an illicit one with a woman observing *'Iddah*, it shall not be effective in perpetual prohibition, whichever *'Iddah* it may be except an *'Iddah* for a revocable divorce, when he has had an illicit intercourse with her, as already mentioned.

Problem # 4. If a woman is observing an *Iddah* for a man, it shall be lawful for him to contract a marriage with her during the *'Iddah*, and need not wait for the expiry of the *'Iddah* except in case there are some extraneous impediments as a third divorce requiring an intermediary husband (*Muḥallil*) or a ninth divorce rendering the wife perpetually unlawful to the husband, or in case the woman is observing an *'Iddah* for him for a revocable divorce in which case too the contract shall be declared void, due to her being tantamount to his wife. If a man has a temporary wife, and he intends to make her marriage a permanent one, it shall be lawful for him to excuse her the remaining period, and contract a permanent marriage with her immediately, contrary to the case when he has a permanent wife and intends to marry her temporarily, and so he divorces her revocably, he may not lawfully marry her temporarily except after she is released of the *'Iddah*.

Problem # 5. Is there a condition of consummation required for the perpetual prohibition in case of ignorance that it must be performed during *'Iddah* or is it sufficient merely to contract a marriage during the currency of *'Iddah* ,even if the consummation takes place after the actual expiry of the *'Iddah*, there are two opinions on this question, the more cautious being in favour of the second alternative, that is rather not devoid of force.

Problem # 6. If a man doubts whether a woman is still observing *'Iddah* or not, he shall decide in favour of its absence, and it shall be lawful for him to marry her, and he shall not be bound to make necessary investigation about her position. Similarly if he doubts about the expiry of the *'Iddah* , and she inform him about its expiry, then after enquiry he may lawfully marry her.

Problem # 7. If a man comes to know that his marriage has taken place during *'Iddah* while he did not know about the subject or the law, but doubts whether he consummated with her in a way that incurs perpetual prohibition or not, he may decide in favour its absence, and she shall not be rendered unlawful to him. Similarly if he knows about the absence of consummation, but doubts about whether he knew it or not, decision shall be made in favour of the absence of consummation, and judgement shall not be given in favour of perpetual prohibition.

Problem # 8. A marriage during *'Iddah* ensuing perpetual prohibition is like a marriage with a woman having a husband. So if a man marries a woman knowing that she has a husband, she shall be rendered perpetually unlawful to him, irrespective of consummation having taken place or not. If he marries her in ignorance, she shall not be rendered unlawful to him except after consummation with her.

Problem # 9. If a man marries a woman bound to observe *'Iddah* but who has not started it due to its

تزوج بمن مات زوجها و لم يبلغها الخبر فان مبدأ عدتها من حين بلوغه، فهل يوجب الحرمة الأبدية أم لا؟ قولان، أحوطهما الأوّل و أرجحهما الثاني.

مسألة ١٠ ـ من كانت عنده أربع زوجات دائميات تحرم عليه الخامسة دائمة، و أما المنقطعة فيجوز الجمع بماشاء خاصة أو مع دائميات.

مسألة ١١ ـ لو كانت عنده أربع فماتت إحداهن يجوز له تزويج أخرى في الحال، و كذا لو فارق إحداهن بالفسخ أو الانفساخ أو بالطلاق البائن، و أولى بذلك ما إذا لم تكن لها عدة كغير المدخول بها و اليائسة، و أما إذا طلقها بالطلاق الرجعي فلا يجوز له تزويج اخرى إلا بعد انقضاء عدة الأولى.

مسألة ١٢ ـ لو طلق الرجل زوجته الحرة ثلاث طلقات لم يتخلل بينها نكاح رجل آخر حرمت عليه، و لا يجوزله نكاحها حتى تنكح زوجاً غيره بالشروط الآتية في كتاب الطلاق، ولو طلقها تسعاً للعدة بتخلل محللين في البين بأن نكحت بغير المطلق بعد الثلاثة الأولى و الثانية حرمت عليه ابداً، و كيفية وقوع تسع طلقات للعدة ان يطلقها بالشرائط ثم يراجعها في العدة و يطأها، ثم يطلقها في طهر آخر ثم يراجعها ثم يطأ ثم يطلقها الثالثة، ثم ينكحها بعد عدتها زوج آخر ثم يفارقها بعد ان يطأها، ثم يتزوجها الأول بعد عدتها، ثم يوقع عليها ثلاث طلقات مثل ما اوقع اولاً ثم ينكحها آخر و يطأها و يفارقها و يتزوجها الأول، و يوقع عليها ثلاث طلقات اخرى مثل السابقات إلى ان يكمل تسعاً تخلل بينها نكاح رجلين، فتحرم عليه في التاسعة ابداً.

القول في الكفر

لا يجوز للمسلمة ان تنكح الكافر دواماً و انقطاعاً، سواء كان اصلياً حربياً او كتابياً او كان مرتداً عن فطرة او عن ملة، و كذا لا يجوز للمسلم تزويج غير الكتابية من اصناف الكفار و لا المرتدة عن فطرة او عن ملة، و اما الكتابية من

not being determined, as when he marries a woman whose husband has died but its news has not reached her yet, as she would start the *'Iddah* from the time she receives it, then shall it ensue perpetual prohibition or not, is a question on which there are two opinions, the more cautious favouring the first alternative, though the more preferable favouring the second.

[Fifth Cause of Prohibition – *Istīfā' al- 'Adad*, or Completion of Permissible Number]

Problem # 10. If a man has four permanent wives, he cannot lawfully marry a fifth one. He may lawfully have as many temporary wives as he likes of same category or along permanent ones.

Problem # 11. If a man has four permanent wives, and one of them dies, he may lawfully marry another immediately. Similar is the case if one of them is separated by dissolving the marriage or its automatic dissolution or by irrevocable divorce. A better case shall be when she is not bound to observe *'Iddah* like a non-enjoyed wife, or a *Yā'isah* (one having a past-child bearing age). But if he divorces a wife revocably, he cannot lawfully marry another except after expiry of her *'Iddah*.

Problem # 12. If a man divorces his free wife three times without an intervening marriage with another, she shall be rendered unlawful to him, and he can lawfully marry her until she marries another with the conditions mentioned under the Section on Divorce. If a man divorces a woman nine times having *'Iddah* with two intervening *Muḥallils* whom she marries after the first third and second third divorces, she shall be rendered perpetually unlawful to him.The procedure of giving nine *'Iddah* divorces is that the man divorces her as per required conditions, then recalls her during her *'Iddah* and cohabits with her, then divorces her in another *Ṭuhr* (period of purity), then recalls her and cohabits with her, then divorces her a third time. Then after the expiry of the *Iddah* another husband marries her and leaves (divorces) her after cohabiting with her. Then the first husband marries her after the expiry of her *'Iddah* , who divorces her three times in eh previous fashion. Then another marries her [after the expiry of her *'Iddah*], cohabits with her and separates from her , and then the first husband marries her again [after the expiry of her *'Iddah*], and divorces her three times in the previous manner, until nine divorces are complete with the intervening marriages with two men, after which the woman shall be rendered perpetually unlawful to him.

Sixth Cause of Prohibition - *Kufr* or Infidelity

It is not lawful for a Muslim woman to marry an infidel man by way of a permanent or temporary marriage, irrespective of the infidel being originally a *Ḥarbī, a Kitābi* or a *Fiṭrī* or *Millī* apostate. Likewise, it is not lawful for a Muslim man to marry a woman other than a *Kitābiyyah* from among the infidel women, or to marry a *Fiṭrī* or a *Millī* apostate woman. As regards a *Kitābiyyah* from among the Jewess and Christian woman, there are several opinions about them, the most prevalent being in favour of their prohibition by way of permanent marriage, but permission by way of temporary marriage, while there some jurists who have prohibited marriage with them absolutely, while others

اليهودية و النصرانية ففيه اقوال، اشهرها المنع في النكاح الدائم و الجواز في المنقطع، و قيل بالمنع مطلقا، و قيل بالجواز كذلك، و الأقوى الجواز في المنقطع، و اما في الدائم فالأحوط المنع.

مسألة ١ ـ الأقوى حرمة نكاح المجوسية، و اماالصائبة ففيها إشكال حيث إنه لم يتحقق عندنا إلى الآن حقيقة دينهم، فان تحقق انهم طائفة من النصارى كما قيل كانوا بحكمهم.

مسألة ٢ ـ العقد الواقع بين الكفار لو وقع صحيحاً عندهم و على طبق مذهبهم يترتب عليه آثار الصحيح عندنا، سواء كان الزوجان كتابيين او وثنيين او مختلفين، حتى انه لو اسلما معاً دفعة اقرا على نكاحهما الأول و لم يحتج الى عقد جديد، بل و كذا لو أسلم أحدهما أيضاً في بعض الصور الآتية، نعم لو كان نكاحهم مشتملاً على ما يقتضي الفساد ابتداءً و استدامة كنكاح إحدى المحرمات عيناً أو جمعاً جرى عليه بعد الاسلام حكم الاسلام.

مسألة ٣ ـ لو أسلم زوج الكتابية بقيا على نكاحهما الأول، سواء كان كتابياً أو وثنياً، و سواء كان إسلامه قبل الدخول أو بعده، و إذا أسلم زوج الوثنية وثنياً كان أو كتابياً فان كان قبل الدخول انفسخ النكاح في الحال، و إن كان بعده يفرق بينهما و ينتظر إنقضاء العدة، فأن أسلمت الزوجه قبل انقضائها بقيا على نكاحهما، و إلا انفسخ النكاح بمعنى أنه يتبين انفساخه من حين إسلام الزوج.

مسألة ٤ ـ لو أسلمت زوجة الوثني أو الكتابي و ثنية كانت أو كتابية فان كان قبل الدخول انفسخ النكاح في الحال،و إن كان بعده وقف على انقضاء العدة لكن يفرّق بينهما، فان أسلم قبل انقضائها فهي امرأته، و إلا بان أنها بانت منه حين إسلامها.

مسألة ٥ ـ لو ارتد أحد الزوجين أو ارتدا معاً دفعة قبل الدخول وقع الانفساخ في الحال، سواء كان الارتداد عن فطرة أو ملة، و كذا بعد الدخول إذا كان

have permitted marriage with them. The stronger opinion is the one in favour of temporary marriage with them, but as regards permanent marriage with them, the more cautious opinion is in favour of forbidding it.

Problem # 1. According to the stronger opinion, it is unlawful to marry a Magian woman. But as regards a Sabian woman, there is hesitation [in allowing marriage with her], as so far the truth about their belief is not clear among us. If it is established that the Sabians are a group from among the Christians, as is generally claimed, then they are to be treated like the Christians.

Problem # 2. A marriage contracted between the infidels, if concluded as valid among them and according to their faith, it has valid effects among us, irrespective of the husband and wife being both *Kitābīs*, idolators or of different faiths, so that if both of them embrace Islam simultaneously, their marriage concluded previously is confirmed, and they do not need to contract marriage de novo. Rather this is the case even if one of them embraces Islam in some of the cases that follow. Of course, if their marriage consists of something that entails perversion initially or for ever, as the marriage with one of the prohibited degrees separately or in conjunction, they are to be governed by the Islamic law after they embrace Islam.

Problem # 3. If the husband of a *Kitābiyyah* embraces Islam, they are allowed to remain husband and wife according to their previous contract, irrespective of his being a *Kitābī* or an idolator, and whether his conversion to Islam has been prior or subsequent to consummation of their marriage. If, however, the husband of an idolatress embraces Islam, irrespective of his being an adolator or a *Kitābī* ,if the conversion has taken place before consummation of their marriage, their marriage is declared void with immediate effect. If, however, the conversion takes place after consummation of their marriage, separation is effected between them, and he waits till the expiry of his wife's *'Iddah*. If the wife also embraces Islam, they are allowed to be husband and wife according to the marriage contracted by them; otherwise, their marriage is dissolved, in the sense that it is automatically dissolved immediately after the conversion of the husband to Islam.

Problem # 4. If the wife of a *Kitābī or* an idolator embraces Islam, irrespective of her being an idolateress or a *Kitābiyyah*, if the conversion has taken place before the consummation of their marriage, the marriage shall automatically be dissolved with immediate effect. If, however, it has taken place subsequent to the consummation of their marriage, it shall hang in abeyance till the expiry of her *'Iddah* , but they shall be separated from each other. If the husband also embraces Islam before the expiry of her *'Iddah*, she shall remain his wife, otherwise, they shall be separated as separation has already been effected since her conversion to Islam.

Problem # 5. If one of the husband and wife apostatises or both of them apostatise together before consummation, their marriage shall be automatically dissolved immediately, irrespective of their

الارتداد من الزوج و كان عن فطرة، و أما إن كان ارتداده عن ملة أو كان الارتداد من الزوجة مطلقاً وقف الفسخ على انقضاء العدة، فان رجع أو رجعت قبل انقضائها كانت زوجته، و إلا انكشف أنها بانت منه عند الارتداد.

مسألة ٦ ـ العدة في ارتداد الزوج عن فطرة كالوفاة، و في غيره كالطلاق.

مسألة ٧ ـ لا يجوز للمؤمنة أن تنكح الناصب المعلن بعداوة أهل البيت عليهم السلام، و لا الغالي المعتقد بألوهيتهم أو نبوتهم، و كذا لا يجوز للمؤمن أن ينكح الناصبة و الغالية، لأنهما بحكم الكفار و إن انتحلا دين الاسلام.

مسألة ٨ ـ لا إشكال في جواز نكاح المؤمن المخالفة غير الناصبة، و أما نكاح المؤمنة المخالف غير الناصب ففيه خلاف، و الجواز مع الكراهة لا يخلو من قوة، لكن لا ينبغي ترك الاحتياط مهما أمكن.

مسألة ٩ ـ لا يشترط في صحة النكاح تمكن الزوج من النفقة، نعم لو زوّج الصغيرة وليها بغير القادر عليها لم يلزم العقد عليها، فلها الرد. لأن فيه المفسدة إلا إذا زوجت بمصلحة غالبة عليها.

مسألة ١٠ ـ لو كان الزوج متمكناً من النفقة حين العقد ثم تجدد العجز عنها بعد ذلك لم يكن للزوجة المذكورة التسلط على الفسخ لا بنفسها و لا بوسيلة الحاكم على الأقوى، نعم لو كان ممتنعاً عن الانفاق مع اليسار و رفعت أمرها إلى الحاكم ألزمه بالانفاق أو الطلاق، فاذا امتنع عنهما و لم يمكن الانفاق من ماله و لا إجباره بالطلاق فالظاهر أن للحاكم أن يطلقها إن أرادت الطلاق.

مسألة ١١ ـ لا إشكال في جواز تزويج العربية بالعجمي و الهاشمية بغير الهاشمي و بالعكس، و كذا ذوات البيوتات الشريفة بأرباب الصنائع الدنية كالكناس و الحجام و نحوهما، لأن المسلم كفو المسلم و المؤمن كفو المؤمنة و المؤمنون بعضهم أكفاء بعض كما في الخبر، نعم يكره التزويج بالفاسق خصوصاً شارب الخمر و الزاني كما مر.

مسألة ١٢ ـ مما يوجب الحرمة الأبدية التزويج حال الاحرام دواماً أو

apostasy being *Fiṭrī* or *Millī*. The same shall be the case if the husband has apostatised and he was a *Fiṭrī* apostate. If, however, he was a *Millī* apostate, or only the wife has apostatised, he dissolution of the marriage shall hang in abeyance until the expiry of her *'Iddah*. If he or she returns to Islam before the expiry of the *'Iddah*, she shall remain in his wedlock; otherwise, it shall be clear that she has already separated from him since the time of apostasy.

Problem # 6. The *'iddah* for a *Fiṭrī* apostasy of the husband shall be like one in husband's death; while, in case of the other [i.e., a *Millī* apostasy it shall be like the one in a divorce.

Problem # 7. It is not lawful for a *Mu'minah* [i.e., a Shī'ah woman] to marry a *Nāṣib* who openly expresses enmity against *Ahl al-Bayt*, A.S., or a *Ghālī* who believes in their divinity or prophethood of Imām 'Ali. Likewise, it is not lawful for a *Mu'min* [*i.e.*, a Shī'ah man] to marry a *Nāṣibah* or *Ghāliyah*, as they are treated as equal to infidels, though they profess Islam.

Problem # 8. There is no objection in the permission for the marriage of a *Mu'min* [i.e. a Shī'ah man] with a woman of the opposite sect other than a *Nāṣibah*. But as regards the marriage of a *Mu'minah* [i.e, a Shī'ah woman] with a man of the opposite sect other than a *Nāṣib*, there is difference of opinion. The legality of such marriage with reluctance is not devoid of force, but caution must not be given up as far as possible.

Problem # 9. The capability of the husband to maintain [the wife] is not a condition for the validity of marriage. Of course, if a guardian marries a minor girl with a man who is not capable of maintaining her, the contract shall not be binding, and she is entitled to rescind it, as it contains disadvantage, except when there is an overwhelming consideration for the marriage.

Problem # 10. If the husband had the capability to maintain [the wife] at the time of contracting the marriage, and later became in capable to do so, the wife shall not be entitled to dissolve the marriage by herself or through the judge, according to the stronger opinion. Of course, if he is recusant to maintain despite his affluence and she refers the case to the judge, he shall compel the husband either to maintain or divorce her. If he refuses to do either, and it is not possible to maintain her out of his property or compel him to divorce her, then apparently the judge shall be entitled to divorce her [on behalf of the husband] if she demands divorce.

[Seventh Cause of Prohibition – *'Adam al-Kafā'ah* or Absence of Equality of Status]

Problem # 11. There is no objection in the permission for the marriage of an Arab woman with a non-Arab man and a Hāshimī woman with a non-Hāshimī man, or vice versa. Same is the case case of marriage of men belonging to lowly professions like a sweeper, a cupper or the like with the women belonging to noble families, as a Muslim is *Kufw* (or equal or suitable) for a Muslim, and a *Mu'min* is suitable for a *Mu'minah*. 'The believers are suitable for one another', as iterated in the Tradition. Of course, marriage with a *Fāsiq* or profligate person, particularly a drinker of wine and fornicator, is disapproved, as already mentioned.

[Eighth Cause of Prohibition – Marriage while still tying *Iḥrām*]

Problem # 12. Among the marriages incurring prohibition is the marriage contracted while still tying *Iḥrām*, whether permanent or temporary, irrespective of the woman still tying *Iḥrām* or having untied it,

انقطاعاً، سواء كانت المرأة محرمة أو محلة، و سواء كان إيقاع التزويج له بالمباشرة أو بالتوكيل، محرماً كان الوكيل أو محلاً، كان التوكيل قبل الاحرام أو حاله، هذا مع العلم بالحرمة، و أما مع جهله بها و إن بطل النكاح في جميع الصور المذكورة لكن لا يوجب الحرمة الأبدية.

مسألة ١٣ ـ لا فرق فيما ذكر من التحريم مع العلم و البطلان مع الجهل بين أن يكون الاحرام لحج واجب أو مندوب أو لعمرة واجبة أو مندوبة و لا بين أن يكون حجه و عمرته لنفسه أو نيابة عن غيره.

مسألة ١٤ ـ لو كانت الزوجة محرمة عالمة بالحرمة و كان الزوج محلاً فهل يوجب نكاحها الحرمة الأبدية بينهما؟ قولان، أحوطهما ذلك، بل لا يخلو من قوة.

مسألة ١٥ ـ يجوز للمحرم الرجوع في الطلاق في العدة الرجعية من غير فرق بين المطلقة تبرعاً أو المختلعة إذا رجعت في البذل، و كذا يجوز أن يوكّل محلا في أن يزوّج له بعد إحلاله، بل و كذا أن يوكّل محرماً في أن يزوج له بعد إحلالهما.

مسألة ١٦ ـ و من أسباب التحريم اللعان بشروطه المذكورة في بابه بأن يرميها بالزنا و يدعي المشاهدة بلا بينة، أو ينفي ولدها الجامع لشرائط الالحاق به و تنكر ذلك و رفعا أمرهما إلى الحاكم فيأمرهما بالملاعنة بالكيفية الخاصة، فاذا تلاعنا سقط عنه حد القذف و عنها حد الزنا، و انتفى الولد عنه و حرمت عليه مؤبداً.

مسألة ١٧ ـ نكاح الشغار باطل، و هو أن تتزوج امرأتان برجلين على أن يكون مهر كل واحد منهما نكاح الأخرى، و لا يكون بينهما مهر غير النكاحين، مثل أن يقول أحد الرجلين للآخر: زوجتك بنتي أو أختي على أن تزوجني بنتك أو أختك، و يكون صداق كل منهما نكاح الأخرى، و يقول الآخر: قبلت و زوجتك بنتي أو أختي هكذا، و أما لو زوّج إحداهما الآخر بمهر معلوم و شرط عليه أن يزوجّه الأخرى بمهر معلوم، فيصح العقدان و كذا لو شرط أن يزوجه الأخرى و لم يذكر المهر أصلا مثل أن يقول: «زوجتك بنتي على أن تزوجني بنتك» فقال: «قبلت و زوجتك بنتي» فانه يصح العقدان و يستحق كل منهما مهر المثل.

and whether the marriage has been contracted personally [by the parties] or through an agent, and whether the agent is also tying *Iḥrām* or has untied it, and whether the agent has been appointed before tying *Iḥram* or after it. This is the case the parties had knowledge about its prohibition. In case of their ignorance about it, though the marriage shall be declared void in all such cases, yet it shall not incur perpetual prohibition.

Problem # 13. There is no difference in the prohibition despite knowledge or invalidity in case of ignorance whether the *Iḥrām* has been tied for an obligatory or approved Ḥajj, or for an obligatory or approved *'Umrah*, and whether his Ḥajj or *'Umrah* is for himself or for another.

Problem # 14. If the wife were tying *Iḥrām* and having knowledge about the prohibition of such marriage, while the husband had untied *Iḥrām*, will the marriage incur perpetual prohibition, is a question on which there are two opinions, the more cautious being in favour of prohibition, rather it is not devoid of force.

Problem # 15. A man tying *Iḥrām* can lawfully recall his wife after a revocable divorce during her *'Iddah*, without any difference whether he has divorced her of his own accord or it has been in a *Khul'* after the wife's demand of returning the ransom. Likewise, the man may lawfully appoint an agent who has untied *Iḥrām* to contract marriage on his behalf after he has untied *Iḥrām*. Rather he may likewise authorize a man tying *Iḥrām* to contract his marriage after both of them have untied it.

[Ninth Cause of Prohibition – *Li'ān*]

Problem # 16. Among the causes of prohibition is *Li'ān* with the conditions mentioned in its relevant Section, by accusing his wife of adultery claiming ocular demonstration without evidence in favour of his claim, or when he repudiates the affiliation of her child despite fulfilling all the conditions for its affiliation to him, and dissociates it with himself, and both the parties refer the case to a judge, who orders them to resort to mutual imprecation in a specific procedure. After the fulfilment of the mutual imprecation by both the parties, the husband is exempted from the *Ḥadd* (prescribed punishment) for *Qadhf*, or slander, and the wife from the *Ḥadd* for adultery, child is dissociated from him, and the woman is rendered perpetually unlawful to him.

[Tenth Cause of Prohibition – *Shighār* Marriage]

Problem # 17. The *Shighār* marriage is void, in which two women are married to two men on the condition that the dower of each of them should be the marriage of the other, and there is no dower between them other than their marriages. For example, one of the men should say to the other: "I have married my daughter or sister to you on the condition that you marry your daughter or sister to me, and the dower of each of them should be the marriage of the other," and the other says: "I have accepted and have married my daughter or sister in like manner." If, however, one of them marries the other against a prescribed dower, and stipulates that the other should also marry him against the prescribed dower, both the contracts shall be valid. Similar shall be the case if one of them stipulates that the other should marry the other, without mentioning the dower at all, as when he says: "I have married you my daughter on the condition that you marry me your daughter,," and the other should say: "I have accepted, and have married you my daughter," in which case both the contracts shall be valid, and each

القول في النكاح المنقطع

و يقال له: المتعة والنكاح المؤجل.

مسألة ١ ـ النكاح المنقطع كالدائم في أنه يحتاج إلى عقد مشتمل على إيجاب و قبول لفظيين و أنه لا يكفي فيه مجرد الرضا القلبي من الطرفين و لا المعاطاة و لا الكتابة و لا الاشارة، و في غير ذلك كما فصل ذلك كله.

مسألة ٢ ـ ألفاظ الايجاب في هذا العقد «متعت» و «زوجت» و «انكحت» أيها حصلت وقع الايجاب به، و لا ينعقد بمثل التمليك و الهبة و الاجارة، و القبول كل لفظ دال على إنشاء الرضا بذلك كقوله: «قبلت المتعة» أو «... التزويج» و كفى «قبلت» و «رضيت» ولو بدأ بالقبول فقال: «تزوجتك» فقالت: «زوجتك نفسي» صح.

مسألة ٣ ـ لا يجوز تمتع المسلمة بالكافر بجميع أصنافه، و كذا لا يجوز تمتع المسلم بغير الكتابية من أصناف الكفار و لا بالمرتدة و لا بالناصبة المعلنة بالعداوة كالخارجية.

مسألة ٤ ـ لا يتمتع على العمة ببنت أخيها، و لا على الخالة ببنت أختها إلا باذنها أو إجازتها، و كذا لا يجمع بين الأختين.

مسألة ٥ ـ يشترط في النكاح المنقطع ذكر المهر، فلو أخل به بطل، و يعتبر فيه أن يكون مما يتمول، سواء كان عيناً خارجياً أو كلياً في الذمة أو منفعة أو عملاً صالحاً للعوضية أو حقاً من الحقوق المالية كحق التحجير و نحوه، و أن يكون معلوماً بالكيل أو الوزن في المكيل و الموزون و العد في المعدود أو المشاهدة أو الوصف الرافعين للجهالة، و يتقدر بالمراضاة قلّ أو كثر.

مسألة ٦ ـ تملك المتمتعة المهر بالعقد، فيلزم على الزوج دفعه إليها بعده لو طالبته و إن كان استقراره بالتمام مراعى بالدخول و وفائها بالتمكين في تمام

woman shall have her proper dower.

Chapter Four – Temporary Marriage (*Nikāḥ al-Munqati'* or *Mut 'ah*)

It is also called *Mut'ah* or *Nikāḥ al-Mu'ajjal.*

Problem # 1. A Temporary Marriage is like a Permanent Marriage, in so far as it also requires a Contract consisting of Declaration and Acceptance expressed in words, and that in it also mere willingness at heart by both the parties is not sufficient, nor is *Mu'āṭāt* , writing or signs . Besides these things, the laws are the same as explained under the Permanent Marriage.

Problem # 2. The words used for Declaration in this kind of contract are ***"Matta'tu", "****Zavvajtu*" and "*Ankaḥtu*", any of these words being sufficient for Declaration, but it is not concluded by using words meaning *tamlik, hibah or ijārah.* As regards Acceptance any word indicating the sense of consent with the Declaration is sufficient, as saying: "*Qabiltu al-Mut'ah*" (I have accepted the *Mut'ah), or "....* *Tazvīj*" It would be sufficient to say merely "*Qabiltu*" (I have accepted) or "*Raḍītu*" (I have agreed). If a person starts with Acceptance, by saying: "*Tazavvajtuki*" (I have taken you in marriage) and the woman saying: "*Zavvajtuka nafsī*", it shall be valid.

Problem # 3. It is not lawful to marry a Muslim woman to an infidel of any denomination by way of temporary marriage. So also it is neither lawful for a Muslim man to marry an infidel woman of any denomination except a *Kitābiyyah*, nor a woman who has apostatised, nor a *Nāṣibah* who openly expresses enmity (against the *Ahl al-Bayt*) like a *Khārijī* woman.

Problem # 4. After marrying a paternal aunt by way of a Temporary Marriage one must not lawfully marry her brother's daughter nor after marrying maternal aunt one must marry her sister's daughter except with her consent or permission. So also one must not conjoin two sisters.

Problem # 5. It is a condition in a Temporary Marriage to mention dower. If there is a failure to mention dower, the marriage shall be void. It is also a condition in dower that it must be something that has value, irrespective of its being a substantial thing externally or a whole thing due to some one, a usufruct , a labour that can be converted into compensation, or any of the financial rights, as the right of occupation of a barren land, or the like, and that it must be capable of being ascertained by measure, weight when it can be weighed, counting when it can be counted, or observation or description that removes ignorance, and its amount should be fixed with the mutual consent of both the parties, whether large or small.

Problem # 6. The woman contracted by way of a Temporary Marriage becomes the owner of the dower by virtue of the contract. So it is binding on the husband to pay it to her subsequent to the conclusion of

المدة، فلو وهبها المدة فان كان قبل الدخول لزمه نصف المهر، و إن كان بعده لزمه الجميع، و إن مضت من المدة ساعة و بقيت منها شهور أو أعوام فلا يقسط المهر على ما مضى منها و ما بقي، نعم لو لم يهب المدة و لكنها لم تف بها و لم تمكنّه من نفسها في تمامها كان له أن يضع من المهر بنسبتها، إن نصفاً فنصف، و إن ثلثاً فثلث و هكذا ما عدا أيام حيضها، فلا ينقص لها شيء من المهر، و في إلحاق سائر الأعذار كالمرض المدنف و نحوه بها أو عدمه وجهان بل قولان، و لا يترك الاحتياط بالتصالح.

مسألة ٧ - لو وقع العقد و لم يدخل بها مع تمكينها حتى انقضت المدة استقر عليه تمام المهر.

مسألة ٨ - لو تبين فساد العقد بأن ظهر لها زوج أو كانت أخت زوجته أو أمها مثلاً و لم يدخل بها فلا مهر لها، ولو قبضته كان له استعادته، بل لو تلف كان عليها بدله، و كذا إن دخل بها و كانت عالمة بالفساد، و أما إن كانت جاهلة فلها مهر المثل، فان كان ما أخذت أزيد منه استعاد الزائد، و إن كان أقل أكمله.

مسألة ٩ - يشترط في النكاح المنقطع ذكر الأجل، فلو لم يذكره متعمداً أو نسياناً بطل متعة و انعقد دائماً، و تقدير الأجل إليهما طال أو قصر، و لابد أن يكون معيناً بالزمان محروساً من الزيادة و النقصان، ولو قدره بالمرة أو المرتين من دون أن يقدره بزمان بطل متعة وانعقد دائماً على إشكال، و الأحوط فيه إجراء الطلاق و تجديد النكاح لو أراد، و أحوط منه مع ذلك الصبر إلى انقضاء المدة المقدرة بالمرة أو المرتين أو هبتها.

مسألة ١٠ - لو قالت زوجتك نفسي إلى شهر أو شهراً مثلاً و أطلقت اقتضى الاتصال بالعقد، و هل يجوز أن تجعل المدة منفصلة عنه بأن يعيّن المدة شهراً مثلاً و يجعل مبدؤه بعد شهر من حين العقد أم لا؟ قولان، أحوطهما الثاني.

مسألة ١١ - لا يصح تجديد العقد عليها دائماً أو منقطعاً قبل انقضاء الأجل أو

the contract if she demands it, though its establishment in entirety depends on the consummation of the marriage and the fulfilment of her complete surrender to the embraces of the husband throughout the period. If the husband excuses the wife the remaining period, then if it were before consummation, he shall be bound to pay half the dower. If it were after the consummation, he shall be bound to pay her whole dower. If an hour has passed from the period and there remain several months or years, the dower shall not be divided into the time tht has passed and what remains there. Of course, if he has not excused the period, and the woman fails to fulfil it and surrender herself to the embraces of the husband throughout the period, the husband shall be entitled to reduce the dower proportionately, so that if it were half he may reduce half and if it were a third he may reduce a third, and so on, excluding the duration of her menstruation for which no reduction shall be made from the dower. As regards the affiliation of other excuses as her long illness, etc. or its absence, there are two alternatives, rather two opinions, but caution must not be given up by reaching a compromise.

Problem # 7. If a marriage is contracted, but consummation has not taken place despite her complete surrender until the expiry of the period for which the marriage was contracted, the liability for payment of dower by shall be established.

Problem # 8. If some flaw in the contract comes to light, as when it transpires that, suppose, the woman has had a husband, or she were the sister or mother of his wife, but there has been no consummation, she shall not be entitled to any dower. If she has already received the dower, she shall have to return it. Rather even if it is lost, she shall have to pay its substitute. Same shall be the rule if consummation has taken place, but she knew about the flaw in the contract. If, however, she were ignorant, she shall have her proper dower. If what she has already receives is more than her proper dower, she shall return the surplus, and if it were less than her proper dower, she shall have pay the deficit.

Problem # 9. It is a condition in a Temporary Marriage to mention its period. If it is not mentioned deliberately or out of forgetfulness, it shall be cancelled as a Temporary Marriage and converted into a Permanent Marriage. The period may be long or short. It should be so fixed that it could be reduced or increased. If it is specified as once or twice, without mentioning the duration of time, it shall be cancelled as a Temporary Marriage and converted into a Permanent one, though there is hesitation in doing so. It more cautious to resort to divorce in it and contract a fresh marriage, if so desired. It is more cautious than that to wait till the expiration of the period specified as once or twice or excuse the remaining period to the wife.

Problem # 10. If a woman says: "I have given myself in marriage to you (suppose) for one or two months, and has left it free from being attached with the contract, then will it is be lawful to make the period separate from the contract and specify the time of one months, suppose, and make its start a month after the conclusion of the contract, or not, is a question on which there are two opinions, the more cautious being the second alternative.

Problem # 11. It is not lawful to renew the contract as a Temporary or Permanent Marriage before the expiry of its period or excusing the remaining period. If the time for which the marriage has been

بذل المدة، فلو كانت المدة شهراً و أراد الازدياد لابد أن يهبها ثم يعقد عليها.

مسألة ١٢ ـ يجوز أن يشترط عليها و عليه الاتيان ليلاً أو نهاراً، و أن يشترط المرة أو المرات مع تعيين المدة بالزمان.

مسألة ١٣ ـ يجوز العزل من دون إذنها في المنقطع و إن قلنا بعدم جوازه في الدائم، و لكن يلحق به الولد لو حملت و إن عزل، لاحتمال سبق المني من غير تنبه منه، ولو نفاه عن نفسه انتفى ظاهراً و لم يفتقر إلى اللعان إن لم يعلم أن نفيه كان عن إثم مع احتمال كون الولد منه، و على أيّ حال لا يجوز له النفي بينه و بين الله إلا مع العلم بالانتفاء.

مسألة ١٤ ـ لا يقع عليها طلاق، و انما تبين بانقضاء المدة أو هبتها، و لا رجوع له بعد ذلك.

مسألة ١٥ ـ لا يثبت بهذا العقد توارث بين الزوجين، فلو شرطا التوارث أو توريث أحدهما ففي التوريث إشكال، فلا يترك الاحتياط بترك هذا الشرط، و معه لا يترك بالتصالح.

مسألة ١٦ ـ لو انقضى أجلها أو وهب مدتها قبل الدخول فلا عدة عليها، و إن كان بعده و لم تكن غير بالغة و لا يائسة فعليها العدة، وهي على الأشهر الأظهر حيضتان، و إن كانت في سن من تحيض و لا تحيض فعدتها خمسة و أربعون يوماً، و الظاهر اعتبار حيضتين تامتين، فلو انقضى الأجل أو وهب المدة في أثناء الحيض لم يحسب تلك الحيضة منها، بل لابد من حيضتين تامتين بعد ذلك. هذا فيما إذا كانت حائلاً، ولو كانت حاملاً فعدتها إلى أن تضع حملها كالمطلقة على إشكال، فالأحوط مراعاة أبعد الأجلين من وضع الحمل و من انقضاء خمسة و أربعين يوماً أو حيضتين و أما عدتها من الوفاة فأربعة أشهر و عشرة أيام إن كانت حائلاً و أبعد الأجلين منها و من وضع حملها إن كانت حاملاً كالدائمة.

مسألة ١٧ ـ يستحب أن تكون المتمتع بها مؤمنة عفيفة، و السؤال عن حالها قبل التزويج و أنها ذات بعل أو ذات عدة أم لا، و أما بعده فمكروه، و ليس

contracted is one month, and the man intends to increase it, it shall be indispensable for him to excuse her the remaining period, and then contract a fresh marriage.

Problem # 12. (In a temporary marriage), it is allowed to stipulate by both of them to have sexual intercourse during the day or at night, and also to stipulate its performance once or several times when the time is specified according to period.

Problem # 13. In a temporary marriage, practising *'Azl* (*extrahere ante emissionem seminis*) is allowed without the permission of the wife, though we have declared unlawful in a permanent marriage, but the child is associated with the husband if she conceives even after practising *'Azl,* due to the likelihood of the sperm having been discharged earlier without the knowledge of the husband. If, however, denies the affiliation of the child to himself, apparently it shall be dissociated from him, and there is no need of installing the process of *Li'ān,* if he does not know that his denial of the child shall be a sin with the likelihood of the child belonging to him. Anyhow, it is not lawful for the husband to deny the affiliation of the child to him between him and Allāh except with the full knowledge of its dissociation from him.

Problem # 14. (In a temporary marriage), divorce does not take place, and the wife is separated from the husband by the mere expiry or excusing of the period, and the husband cannot recall her.

Problem # 15. In a temporary marriage, the right of mutual inheritance is not established. If the parties stipulate the mutual inheritance or the inheritance of one of them, then there shall be hesitation in the inheritance f one of them. So caution must not be given up by abandoning such stipulation. In case of a stipulation, caution should not be given up to reach a compromise.

Problem # 16. In case of expiry or excusing of the term before consummation, the wife shall not be bound to observe *'Iddah*. In case it is subsequent to consummation and the wife is neither a minor nor a *Yā'isah*, she shall be bound to observe *'Iddah,* its period being two menstruations according to the more prevalent and evident opinions. If the wife is within the age of menstruation but does not menstruate, her *'Iddah* shall be for forty-five days. Apparently it is a condition that the two menstrual periods must complete. In case of the expiry or excusing of the the period takes place during menstruation, that menstrual period shall not be counted, and it shall be indispensable for her to observe the *'Iddah* for two complete menstrual periods. This is the case when she is not pregnant. If, however, she is pregnant, then her *'Iddah* shall terminate with the delivery like a divorced woman, though there is some hesitation in it. So it is more cautious to observe the *'Iddah* for the longer period between the delivery and expiry of forty-five days or two menstrual periods. Her "*Iddah* for [husband's] death is four months and ten days if she is not pregnant, and the longer of the periods like a permanent wife if she is pregnant.

Problem # 17. It is approved that the woman married temporarily must be a chaste *Mu'minah*, and to investigate about her condition before marriage whether she has already a husband or is observing

السؤال و الفحص عن حالها شرطاً في الصحة.

مسألة ١٨ ـ يجوز التمتع بالزانية على كراهية خصوصاً لو كانت من العواهر والمشهورات بالزنا، و إن فعل فليمنعها من الفجور.

القول في العيوب الموجبة لخيار الفسخ والتدليس

وهي قسمان: مشترك و مختص، أما المشترك فهو الجنون، و هو اختلال العقل، و ليس منه الاغماء، و مرض الصرع الموجب لعروض الحالة المعهودة في بعض الأوقات، و لكل من الزوجين فسخ النكاح بجنون صاحبه في الرجل مطلقاً سواء كان جنونه قبل العقد مع جهل المرأة به أو حدث بعده قبل الوطء أو بعده، نعم في الحادث بعدالعقد إذا لم يبلغ حداً لا يعرف أوقات الصلاة تأمل و إشكال، فلا يترك الاحتياط، و أما في المرأة ففيما إذا كان قبل العقد و لم يعلم الرجل دون ما إذا طرأ بعده. و لا فرق في الجنون الموجب للخيار بين المطبق و الأدوار و إن وقع العقد حال إفاقته، كما أن الظاهر عدم الفرق في الحكم بين النكاح الدائم و المنقطع.

و أما المختص فالمختص بالرجل ثلاثة: الخصاء، و هو سلّ الخصيتين أورضهما، و تفسخ به المرأة مع سبقه على العقد وعدم علمها به.

و الجب، و هو قطع الذكر بشرط أن لا يبقى منه ما يمكن معه الوطء ولو قدر الحشفة، و تفسخ المرأة فيما إذا كان ذلك سابقاً على العقد، و أما اللاحق به ففيه تأمل، بل لا يبعد عدم الخيار في اللاحق مطلقاً سواء كان قبل الوطء أو بعده.

والعنن، و هو مرض تضعف معه الآلة عن الانتشار بحيث يعجز عن الايلاج، فتفسخ المرأة بشرط عجزه عن الوطء مطلقاً، فلو لم يقدر على وطئها و قدر على وطء غيرها لا خيار لها، و يثبت به الخيار سواء سبق العقد أو تجدد

'Iddah or not. But after the marriage, such investigation is disapproved, and enquiry and investigation about her actual condition is not a condition for the validity [of the marriage].

Problem # 18. It is allowed to contract a temporary marriage with an adulteress, though with an amount of reluctance, particularly she is one of the whores and is notorious for adultery. If one marries her, he must forbid her from indulging in debauchery.

Chapter Five - Blemishes giving Right of Opting Dissolution of Marriage, & Deception

There are two types of Blemishes, common and exclusive. Blemishes common to man and woman are insanity that means the loss of sense, but does not include swooning and epilepsy that causes a temporary loss of sense for some time. Each of the spouses is entitled to dissolve the marriage due to insanity of his/her partner, in a man absolutely irrespective of its being before the contract with the ignorance of the wife or subsequent to the contract before or after consummation. Of course, in case of its being subsequent to contract, if it is not to the extent that the man is unable to make out the prescribed times of prayers, there shall be some hesitation, but caution must not be given up. In a woman, in case the insanity must be precedent to the contract and without the knowledge of the husband, and not when it is subsequent to the contract. In case of insanity giving rise to the right of option for dissolving the marriage, there is no difference between a consistent and periodical one, even if the contract has been made during recovery of sense, as also there is no difference in the marriage being temporary or permanent.

As regards the exclusive blemishes, the exclusive blemishes of man are three.

Firstly, Eunuchism, which means the castration or contusion of both the testicles, and which entitles the woman to dissolve the marriage if it is precedent to the contract and without the knowledge of the woman about it.

Secondly, *Jubb* , and that is cutting of the male organ, but with the condition that what remains must not enable a man to have connubial intercourse, even if it is equal to a glans penis. This entitles the wife to dissolve the marriage, if it were precedent to the marriage but in case of it being subsequent to the contract, there is hesitation; rather it is not far from an absolute absence of option in case it were subsequent to the contract, irrespective of its being before or after consummation.

Thirdly, Impotence, and that a disease that disables the male organ from expansion so that it cannot erect. It entitles the wife to dissolve the marriage provided the man is absolutely unable to perform connubial intercourse. If the man is not able to have sexual intercourse with the wife, but is able to do so with another woman, the wife shall have no option to dissolve the marriage. In case of Impotence, the wife has the option [to dissolve the marriage] irrespective of its being precedent to the

بعده، لكن بشرط أن لم يقع منه وطؤها ولو مرة حتى دبراً، فلو وطأها ثم حدثت به العنة بحيث لم يقدر على الوطء بالمرة فلا خيار لها.

و المختص بالمرأة ستة: البرص و الجذام و الافضاء، و قد مر تفسيره فيما سبق، و القرن، و يقال له العفل، وهو لحم أو غدة أو عظم ينبت في فم الرحم يمنع عن الوطء، بل ولو لم يمنع إذا كان موجباً للتنفر و الانقباض على الأظهر، و العرج البيّن و إن لم يبلغ حد الاقعاد، والزمانة على الأظهر، و العمى، و هو ذهاب البصر عن العينين و إن كانتا مفتوحتين، و لا اعتبار بالعور و لا بالعشا، و هي علة في العين لا يبصر في الليل و يبصر بالنهار، ولا بالعمش، و هو ضعف الرؤية مع سيلان الدمع في غالب الأوقات.

مسألة ١ ـ انما يفسخ العقد بعيوب المرأة إذا تبين وجودها قبل العقد، و أما ما يتجدد بعده فلا اعتبار به سواء كان قبل الوطء أو بعده.

مسألة ٢ ـ ليس العقم من العيوب الموجبة للخيار لا من طرف الرجل و لا من طرف المرأة.

مسألة ٣ : ليس الجذام و البرص من عيوب الرجل الموجبة لخيار المرأة على الأقوى.

مسألة ٤ ـ خيار الفسخ في كل من الرجل و المرأة على الفور، فلو علم كل منهما بالعيب فلم يبادر بالفسخ لزم العقد، نعم الظاهر أن الجهل بالخيار بل و الفورية عذر، فلا يسقط مع الجهل بأحدهما لو لم يبادر.

مسألة ٥ ـ إذا اختلفا في العيب فالقول قول منكره مع اليمين إن لم تكن لمدعيه بينة، و يثبت بها العيب حتى العنن على الأقوى، كما أنه يثبت كل عيب باقرار صاحبه أو البينة على إقراره، و كذا يثبت باليمين المردودة على المدعي، ولو نكل المنكر عن اليمين و لم يردها ردها الحاكم على المدعي، فان حلف يثبت به، وتثبت العيوب الباطنة للنساء بشهادة أربع نسوة عادلات كما في نظائرها.

مسألة ٦ ـ لو ثبت عنن الرجل فان صبرت فلا كلام، و إن لم تصبر ورفعت

contract or its recurrence subsequently, provided he has not performed intercourse with her even once and even in the unnatural way [i.e., from her backside]. If, however, the man performs intercourse with her, and is subsequently inflicted by the malady in a way that he is unable to enjoy her at all, the wife shall have no option.

The exclusive blemishes of a woman are *Baraṣ* (or white leprosy), *Judhām* (or black leprosy) and *Ifḍā'*(or the two passages of nature becoming one), their definition has already been given before, *Qarn* that is also called *'Afal*, which is a flesh, gland or bone that grows on the mouth of the womb obstructing sexual intercourse, rather even if does not obstruct sexual intercourse but it produces disgust or contraction , according to the clearer opinion, clear (and visible) lameness, even if it has not reached the stage of *Iq'ād* (or complete lameness due to which a woman is not able to move), *Zamānah* (or chronic illness), according to the clearer opinion), *'Amā'*, that means the loss of sight of both the eyes, even if both the eyes are open, but not *'Avar* (or loss of sight of one eye) or *'Ashā'* (or nyctalopia) which is a disease in which the patient cannot see at night but can see during the day, or *'Amash*, which is weakness of sight along with the eye watering most of the times.

Problem # 1. A marriage is dissolved due to the blemishes in a woman when their existence transpires before the conclusion of the contract, but the blemishes that appear after it have no effect, irrespective of their being before or after the connubial intercourse.

Problem # 2. *'Aqm*, or sterility is not one of the blemishes giving right of option to cancel marriage , irrespective of it is the man or the woman that suffers from it.

Problem # 3. *Judhām* and *Baraṣ* are not among the blemishes in a man giving right of option to the wife to cancel the marriage, according to the stronger opinion.

Problem # 4. The right of option in a man or woman is to be exercised immediately. If both of them have knowledge about the existence of a blemish but do not resort to cancel the marriage, the contract shall become binding. Of course, obviously the ignorance about the blemish, rather about immediacy of the action shall be an excuse, so the right shall not be dropped in case of ignorance about the existence of the blemish or about the immediacy of the act if the party fails to
Hasten to act.

Problem # 5. If there is difference between the husband and wife over the existence of a blemish, the word of the denier shall be accepted when accompanied by an oath, if the party claiming its existence has no evidence in favour his/her claim, and that will establish the existence of the blemish, including even Impotence, according to the stronger opinion, as every blemish is established by the admission of the party having it or the evidence in support of his admission. So also it is established by the oath of the claimant when returned to him. If the denier refuses to take oath, and also does not return it to the claimant, the judge shall return it to the claimant. If the claimant takes oath, his claim shall be established. The hidden blemishes of a woman are proved by the evidence of four just women, as is the case in such other instances.

Problem # 6. If Impotence (*'Inan*) in a man is proved, then, in case the wife is ready to stay (with the

أمرها إلى حاكم الشرع لاستخلاص نفسها منه أجّلها سنة كاملة من حين المرافعة، فان واقعها أو واقع غيرها في أثناء هذه المدة فلا خيار لها، و إلا كان لها الفسخ فوراً عرفياً، فان لم تبادر به فان كان بسبب جهلها بالخيار أو فوريته لم يضر كما مر، و إلا سقط خيارها، و كذا إن رضيت أن تقيم معه ثم طلبت الفسخ بعد ذلك، فانه ليس لها ذلك.

مسألة ٧ ـ الفسخ بالعيب ليس بطلاق، سواء وقع من الزوج أو الزوجة، فليس له أحكامه إلا تنصيف المهر في الفسخ بالعنن كما يأتي، و لا يعتبر فيه شروطه، فلا يحسب من الثلاثة المحرمة المحتاجة إلى المحلّل، و لا يعتبر فيه الخلو من الحيض و النفاس و لا حضور العدلين.

مسألة ٨ ـ يجوز للرجل الفسخ بعيب المرأة من دون إذن الحاكم، وكذا المرأة بعيب الرجل، نعم مع ثبوت العنن يفتقر الى الحاكم، لكن من جهة ضرب الأجل حيث إنه من وظائفه لا من جهة نفوذ فسخها، فبعد ماضرب الأجل لها كان لها التفرد بالفسخ عند انقضائه و تعذر الوطء في المدة من دون مراجعته.

مسألة ٩ ـ لو فسخ الرجل بأحد عيوب المرأة فان كان قبل الدخول فلا مهر لها، و إن كان بعده استقر عليه المهر المسمى. و كذا الحال فيما إذا فسخت المرأة بعيب الرجل، فتستحق تمام المهر إن كان بعده، و إن كان قبله لم تستحق شيئاً إلا في العنن، فانها تستحق عليه نصف المهر المسمى.

مسألة ١٠ ـ لو دلست المرأة نفسها على الرجل في أحد عيوبها الموجبة للخيار وتبين له بعد الدخول فان اختار البقاء فعليه تمام المهر، و إن اختار الفسخ لم تستحق المهر، و إن دفعه إليها استعاده، و إن كان المدلس غير الزوجة فالمهر المسمى و إن استقر على الزوج بالدخول و استحقت عليه الزوجة إلا أنه بعد ما دفعه إليها يرجع به إلى المدلس و يأخذه منه.

مسألة ١١ ـ يتحقق التدليس بتوصيف المرأة بالصحة عند الزوج للتزويج بحيث صار ذلك سبباً لغروره و انخداعه، فلا يتحقق بالاخبار لا للتزويج أو لغير

husband), well and good. If, however, she refuses to stay with him, and refers the case to the judge of a Sharī'ah Court to get herself released from the husband, he shall grant one complete year from the date of filing the case. If the man succeeds in having sexual intercourse with her or some other woman during that period, she shall have no right to cancel the marriage; otherwise, she shall be entitled to dissolve the marriage immediately, according to the custom. If she fails to resort to cancellation, then if it were due to her ignorance about the right of option or the immediacy of her action, it shall not have any adverse effect [on her right of option]; otherwise, she shall forfeit her right of option. The same shall be the rule if she is willing to stay with him, and later demands cancellation of the marriage, in which she shall not be entitled to do so.

Problem # 7. The dissolution of marriage due to a blemish is not a divorce, irrespective of whether it has been caused by the husband or the wife. It is, therefore, not governed by the laws of divorce, except the one relating to the payment of half the dower due to Impotence, as shall follow. So also the conditions of a divorce do not apply to it. It is also not counted as one of the three divorces incurring prohibition and requiring a *Muḥallil* (or an intermediary husband). There is no condition in it that the woman must be clean of menstrual or puerperal blood, nor the presence of two witnesses.

Problem # 8. A man is allowed to dissolve the marriage due to a blemish in a woman without the permission of a judge, and so is a woman due to the blemish in a man. Of course, in case of proof of Impotence, it is required to be referred to a judge, but due to the fixation of the respite [of one year] by virtue of its being his duty and not due to any effect in the dissolution of the marriage. After the fixation of the waiting period for her, she shall be independent to cancel the marriage in case of the expiry of the prescribed time and the husband's inability to perform sexual intercourse during that period without referring the matter to the judge (again).

Problem # 9. If the man dissolves the marriage due to any blemish in the wife, then if it were before consummation, she shall not be entitled to any dower, but if it were after it, his liability for the payment of her proper dower shall be established. The same shall be the case if the woman dissolves the marriage due to a blemish in a man, so that she shall be entitled to her whole dower if it were subsequent to consummation, but if it were before consummation, she shall be entitled to nothing except in case of his Impotence, when she shall be entitled to half her prescribed dower.

Problem # 10. If a woman has deceived the man in case of any of the blemishes giving right of option of dissolving the marriage, and its transpires to him subsequently, then if he opts for its subsistence, he shall be liable to pay her whole dower, but if he opts for its dissolution, she shall not be entitled to the dower, and if he has already paid it to her, she shall be required to return it to him. If the person responsible for the reception is some one other than the wife, she shall be entitled to her prescribed dower, even if it is established due to consummation by him and consequent entitlement to it by the wife, except that after he has paid it to her, he shall be entitled to have recourse to the deceiver for its recovery from him.

Problem # 11. Deception takes place by describing the woman as sound before the husband for marriage in a way that it becomes a cause of deceiving and misleading him, But it does not take place

الزوج، و الظاهر تحققه أيضاً بالسكوت عن العيب مع العلم به و خفائه عن الزوج و اعتقاده بالعدم.

مسألة ١٢ ـ من يكون تدليسه موجباً للرجوع عليه بالمهر هو الذي يسند إليه التزويج: من وليها الشرعي أو العرفي كأبيها وجدها و أمها و أخيها الكبير وعمهاوخالها ممن لا تصدر إلا عن رأيهم و يتصدون تزويجها و يرجع إليهم فيه في العرف و العادة، و مثلهم على الظاهر بعض الأجانب ممن له شدة علاقة و ارتباط بها بحيث لا تصدر إلا عن رأيه، و يكون هو المرجع في أمورها المهمة و يركن اليه فيا يتعلق بها، بل لا يبعد أن يلحق بمن ذكر من يراود عند الطرفين و يعالج في إيجاد وسائل الائتلاف في البين.

مسألة ١٣ ـ كما يتحقق التدليس في العيوب الموجبة للخيار كالجنون و العمى و غير هما كذلك يتحقق في مطلق النقص كالعور و نحوه باخفائه، و كذا في صفات الكمال كالشرف و الحسب و النسب و الجمال و البكارة و غيرها بتوصيفها بها مع فقدانها، و لا أثر للأول أي التدليس في العيوب الموجبة للخيار إلا رجوع الزوج على المدلس بالمهر كما مرّ، و أما الخيار فانما هو بسبب نفس وجود العيب، و أما الثاني و هو التدليس في سائر أنواع النقص و في صفة الكمال فهو موجب للخيار إذا كان عدم النقص أو وجود صفة الكمال مذكورين في العقد بنحو الاشتراط، و يلحق به توصيفها به في العقد و إن لم يكن بعبارة الاشتراط، كما إذا قال: زوجتك هذه الباكرة أو غير الثيبة، بل الظاهر أنه إذا وصفها بصفة الكمال أو عدم النقص قبل العقد عند الخطبة و المقاولة ثم أوقعه مبنياً على ما ذكر كان بمنزلة الاشتراط، فيوجب الخيار، و إذا تبين ذلك بعد العقد و الدخول و اختار الفسخ و دفع المهر رجع به على المدلس.

مسألة ١٤ ـ ليس من التدليس الموجب للخيار سكوت الزوجة أو وليّها عن النقص مع وجوده و اعتقاد الزوج عدمه في غير العيوب الموجبة للخيار و أولى بذلك سكوتها عن فقد صفة الكمال مع اعتقاد الزوج وجودها.

by mere information not for the sake of marriage or to one other than the husband. Apparently it takes place even by silence about the blemish despite its knowledge and concealing it from the husband so that he comes to believe in its absence.

Problem # 12. A person whose deception causes a recourse to him/her for the recovery of dower is one to whom giving in marriage is ascribed, as a guardian by law like her father or grandfather or a guardian by custom as her mother, brother, paternal or maternal uncle without whose consultation she should not have married, who arrange her marriage and who are referred to for it by custom and usage.

Like them are apparently some of the strangers with whom she has extreme attachment and connection so that she would not marry without consulting them, to whom she refers in her important matters and relies upon them in all matters . It is not far from including even one who seek to win the consent of both the parties and try to bring about union between them.

Problem # 13. As deception takes place in blemishes giving right of option [for cancellation of marriage] like insanity, or blindness, etc., so also it takes place absolutely by concealing any blemish like being one-eyed or the like. So is the case with the qualities of nobility, descent, beauty, virginity, etc. by describing [the party as possessing them] despite the party's being deprived of them. In case of the first category there shall be no effect in blemishes giving right of option except that the husband may have recourse to the deceiver for the recovery of the dower, as already mentioned.As regards the right of option, it is due to the existence of the blemish itself. But as far as the other category is concerned, the deception in other kinds of blemishes and the qualities of perfection may give rise to right of option in case the absence of such blemishes or the possession of such qualities of perfection are mentioned in the contract as conditions.

To this is affiliated her description in eh contract even if it is not in the form of stipulation, as when her guardian or agent says: "I have given in marriage to you this virgin girl or non-*thayyiba.*" Rather, apparently when he describes the woman as possessing the quality of perfection or absence of a blemish before the conclusion of the contract at the time of the *Khuṭbah* or negotiation for marriage, and then concludes the marriage as dependent on what he had described, then it shall be tantamount to stipulation, and so shall give right of option. If it transpire after the conclusion of the contract or consummation, and the husband opts for dissolution and pays her dower [to her], he shall be entitled to have recourse to the deceiver for its recovery.

Problem # 14. The deception giving right of option does not include silence of the wife or her guardian over the existence of a blemish or the husband's belief of its absence in case of blemishes not giving right of option, and more than that is their silence over the absence of any quality of perfection [in the woman] despite the husband's belief of its possession by the wife.

مسألة ١٥ ـ لو تزوج امرأة على أنها بكر بأحد الوجوه الثلاثة المتقدمة فوجدها ثيباً لم يكن له الفسخ إلا إذا ثبت بالاقرار أو البينة سبق ذلك على العقد، فكان له الفسخ، نعم لو تزوجها باعتقاد البكارة و لم يكن اشتراط و لا توصيف و إخبار و بناء على ثبوتها فبان خلافها ليس له الفسخ و إن ثبت زوالها قبل العقد.

مسألة ١٦ ـ لو فسخ في الفرض المتقدم حيث كان له الفسخ فان كان قبل الدخول فلا مهر، و إن كان بعده استقر المهر و رجع به على المدلس، و إن كانت هي المدلس لم تستحق شيئاً، و إن لم يكن تدليس استقر عليه المهر و لا رجوع له على أحد، و إذا اختار البقاء أو لم يكن له الفسخ كما في صورة اعتقاد البكارة من دون اشتراط و توصيف و بناء كان له أن ينقص من مهرها شيئاً، و هو نسبة التفاوت بين مهر مثلها بكراً وثيباً، فاذا كان المهر المسمى مأة وكان مهر مثلها بكراً ثمانين و ثيباً ستين ينقص من المأة ربعها، و الأحوط في صورة العلم بتجدد زوالها أو احتماله التصالح و إن كان التنقيص بما ذكر لا يخلو من وجه.

فصل في المهر

و يقال له: الصداق

مسألة ١ ـ كل ما يملكه المسلم يصح جعله مهراً عيناً كان أو ديناً أو منفعة لعين مملوكة من دار أو عقار أو حيوان، و يصح جعله من منفعة الحر كتعليم صنعة و نحوه من كل عمل محلل، بل الظاهر صحة جعله حقاً مالياً قابلاً للنقل و الانتقال كحق التحجير و نحوه، و لا يتقدر بقدر، بل ما تراضى عليه الزوجان كثيراً كان أو قليلاً ما لم يخرج بسبب القلة عن المالية، نعم يستحب في جانب الكثرة أن لا يزيد على مهر السنة، و هو خمسمأة درهم.

مسألة ٢ ـ لو جعل المهر ما لا يملكه المسلم كالخمر و الخنزير صح العقد و بطل المهر، فلم تملك شيئاً بالعقد، و انما تستحق مهر المثل بالدخول نعم فيما إذا

Problem # 15. If a man marries a woman with the belief that she is a virgin in the light of any of the three preceding positions, but finds her a *thayyibah*, he shall not be entitled to dissolve the marriage except when it is proved by the acknowledgement or evidence that it was precedent to the contract, in which case he shall be entitled to dissolve the marriage. Of course, if he married her with the belief that she was a virgin, but there was no such stipulation, description or information and contingence of the marriage on its establishment, and it transpires otherwise, he shall not be entitled to dissolve the marriage, even it is proved that she lost it before the contract.

Problem # 16. In case of the first supposition in which the husband was entitled to dissolve the marriage, if he dissolves it, then if it were before consummation, thee shall be no dower, but if it were after it, the dower shall be established, and he shall have recourse to the deceiver [for its recovery if he has paid it to her]. If the deceiver were the wife herself, she shall not be entitled to any thing. If it were not a deception, her dower shall be established and he shall have no recourse to any one for its recovery. If he opts for the subsistence of the marriage or he is not entitled to dissolve the marriage, as in case of his belief of her virginity without any such stipulation, description or dependence, he shall be entitled to deduct something out of her dower, and that is the proportion between her proper dower for being a virgin and a *Thayyibah*. So if the prescribed dower were one hundred, and her dower being a virgin eighty and a *Thayyibah* sixty, one-fourth shall be deducted from one hundred. In case of his knowledge about the recurrence of its loss or its likelihood, it is more cautious to reach a compromise, even if the deduction described above is not devoid of preference.

Chapter Six - Dower (*Mahr*)

Dower is also called *Ṣadāq*.

Problem # 1. Everything that is capable of being owned by a Muslim is valid subject of dower, whether it is in substance, debt, usufruct of an owned property like a house, real estate or animal. It is valid to make the usufruct of a free person subject of dower as training of a trade, or similar lawful profession. Rather it can be any financial transferable right as the right of occupation of a barren land, or the like. Its amount is not limited. It can of any amount mutually agreed by the spouses big or small when it does not lose financial value due to smallness. Of course, it is approved that it should not exceed the amount of *Mahr al-Sunnah*, tht equal to 500 Dirhams.

Problem # 2. If a thing that cannot be owned by a Muslim is made subject of dower like wine or a pig, the marriage shall be valid but the dower shall be declared invalid, so that the woman shall not own anything through marriage, but shall be entitled to her proper dower after consummation. Of course, in

كان الزوج غير مسلم تفصيل.

مسألة ٣ ـ لابد من تعيين المهر بما يخرج عن الابهام، فلو أمهرها أحد هذين أو خياطة أحد الثوبين مثلاً بطل المهر دون العقد، و كان لها مع الدخول مهر المثل. نعم لا يعتبر فيه التعيين الذي يعتبر في البيع و نحوه من المعاوضات، فيكفي مشاهدة الحاضر و إن جهل كيله او وزنه أو عدّه أو ذرعه كصبرة من الطعام و قطعة من الذهب وطاقة مشاهدة من الثوب و صبرة حاضرة من الجوز و أمثال ذلك.

مسألة ٤ ـ ذكر المهر ليس شرطاً في صحة العقد الدائم، فلو عقد عليها و لم يذكر لها مهراً أصلاً صح العقد، بل لو صرح بعدم المهر صح، ويقال لذلك أي لايقاع العقد بلامهر: تفويض البضع، و للمرأة التي لم يذكر في عقدها مهر: مفوضة البضع.

مسألة ٥ ـ لو وقع العقد بلا مهر لم تستحق المرأة قبل الدخول شيئاً إلا إذا طلقها، فتستحق عليه أن يعطيها شيئاً بحسب حاله من الغنى و الفقر و اليسار والاعسار من دينار أو درهم أو ثوب أو دابة أو غيرها، و يقال لذلك الشيء: المتعة، ولو انفسخ العقد قبل الدخول بأمر غير الطلاق لم تستحق شيئاً، و كذا لو مات أحدهما قبله، و أما لو دخل بها استحقت عليه بسببه مهر أمثالها.

مسألة ٦ ـ الأحوط في مهر المثل هنا التصالح فيما زاد عن مهر السنة، و في غير المورد مما نحكم بمهر المثل ملاحظة حال المرأة و صفاتها من السن والبكارة و النجابة و العفة و العقل و الأدب و الشرف و الجمال و الكمال و أضدادها، بل يلاحظ كل ما له دخل في العرف و العادة في ارتفاع المهر و نقصانه، فتلاحظ أقاربها و عشيرتها و بلدها و غير ذلك أيضاً.

مسألة ٧ ـ لو أمهر ما لا يملكه أحد كالحر أو ما لا يملكه المسلم كالخمر والخنزيرصح العقد و بطل المهر و استحقت عليه مهر المثل بالدخول، و كذلك الحال فيما إذا جعل المهر شيئاً باعتقاد كونه خلاً فبان خمراً أو جعل مال الغير باعتقاد كونه ما له فبان خلافه.

case the husband is a non-Muslim there are separate detailed laws.

Problem # 3. It is indispensable to specify the dower in a way that it may leave no room for confusion. If a man appoints the dower, suppose, as one of these two [things] or the stitching of one of two garments, the dower shall be declared void excluding the contract, and the wife shall be entitled to her proper dower after consummation.

Of course, it is not a condition to specify the dower as it is a condition in a sale or similar other contracts of exchange. So the demonstration of the thing present is sufficient, even its measure, weight, number or length is not known, as a heap of foodstuff, a piece of gold or visible roll of cloth, a present pile of walnut, etc.

Problem # 4. It is not a condition to mention dower for the validity of a permanent marriage. If a woman is contracted in marriage and no dower is mentioned at all, the contract shall be valid. Rather even if it is explicitly mentioned that no dower has been prescribed, it shall be a valid marriage. In case of concluding a marriage without dower it is called "*Tafvīḍ al-Buḍ'*"(surrendering the female organ), and the woman in whose contract dower is not mentioned is called "*Mufavvaḍ al-Buḍ'*" (a woman whose female organ has been surrendered).

Problem # 5. If a marriage is concluded without dower, the wife is not entitled to anything before consummation, except when she is divorced, in which she shall be entitled to be given by him anything according to his position of wealth, poverty, affluence or indigence like Dīnār, Dirham, garment, a riding animal, etc. , and it is called "*Mut'ah*".

If the marriage is dissolved before consummation in any way other than a divorce, the wife shall not be entitled to anything. The same shall be the case if either of them should die before consummation. If, however, the man consummates with her, she shall by virtue of that consummation be entitled to her proper dower.

Problem # 6. in case of a proper dower, it is more cautious to reach a compromise if it exceeds the amount of *Mahr al-Sunnah*. In other cases consideration shall be made for the position and qualities of the woman like her age, virginity, nobility, chastity, sense, manners, high rank, beauty, virtue, or their absence; rather consideration shall be made for all that is kept in view in elevating or reducing the amount of dower according to the prevalent custom, so that the dower of her close relatives, tribe, place, etc. shall be taken into consideration.

Problem # 7. If a man appoints as dower something that is not owned by any one as a free man or that is not owned by a Muslim like wine or a pig, the contract shall be valid, but the dower shall be declared void, and the woman shall be entitled to her proper dower after consummation.

The same shall be the rule if a man makes subject of dower something that he believes to be vinegar but it turns out to be wine, or when he makes the property of another subject of dower believing it to be his property, but it transpires to be otherwise.

مسألة ٨ ـ لو شرّك أباها في المهر بأن سمى لها مهراً ولأبيها شيئاً معيناً يعين ما سمى لها مهراً لها و سقط ما سمى لأبيها، فلا يستحق الأب شيئاً.

مسألة ٩ ـ ما تعارف في بعض البلاد من أنه يأخذ بعض أقارب البنت كأبيها و أمها من الزوج شيئاً ـ و هو المسمى في لسان بعض بـ«شيربها» و في لسان بعض آخر بشيء آخر ـ ليس بعنوان المهر و جزء منه، بل هو شيء يؤخذ زائداً على المهر، و حكمه أنه إن كان إعطاؤه و أخذه بعنوان الجعالة لعمل مباح فلا إشكال في جوازه و حليته، بل وفي استحقاق العامل له و عدم سلطنة الزوج على استرجاعه بعد إعطائه، و إن لم يكن بعنوان الجعالة فان كان إعطاء الزوج للقريب بطيب نفس منه و إن كان لأجل جلب خاطره و تحبيبه و إرضائه حيث إن رضاه في نفسه مقصود أو من جهة أن رضا البنت منوط برضاه فبملاحظة هذه الجهات يطيب خاطر الزوج ببذل المال فالظاهر جواز أخذه، لكن يجوز للزوج استرجاعه مادام موجوداً، و أما مع عدم الرضا من الزوج و انما أعطاه من جهة استخلاص البنت حيث إن القريب مانع عن تمشية الأمر مع رضاها بالتزويج بما بذل لها من المهر فيحرم أخذه و أكله، و يجوز للزوج الرجوع فيه و إن كان تالفاً.

مسألة ١٠ ـ لو وقع العقد بلا مهر جاز أن يتراضيا بعده على شيء سواء كان بقدر مهر المثل أو أقل منه أو أكثر، و يتعين ذلك مهراً و كان كالمذكور في العقد.

مسألة ١١ ـ يجوز أن يجعل المهر كله حالاً ـ أي بلا أجل ـ و مؤجلاً و أن يجعل بعضه حالاً و بعضه مؤجلاً، و للزوجة مطالبة الحال في كل حال بشرط مقدرة الزوج و اليسار، بل لها أن تمتنع من التمكين و تسليم نفسها حتى تقبض مهرها الحال، سواء كان الزوج موسراً أو معسراً، نعم ليس لها الامتناع فيما لو كان كله أو بعضه مؤجلاً و قد أخذت بعضه الحالّ.

مسألة ١٢ ـ يجوز أن يذكر المهر في العقد في الجملة و يفوض تقديره و تعيينه إلى أحد الزوجين بأن تقول الزوجة مثلاً: «زوجتك على ما تحكم ـ أو أحكم ـ من

Problem # 8. If a man makes her father a partner in dower by denominating it a dower and specifying something for her father in it, what is denominated as dower shall remain intact, but what is specified for her father shall be dropped, and the father shall not be entitled to any thing.

Problem # 9. What is prevalent in some places that some of the close relatives of the daughter like her father or mother receive something from the husband, called in the language of some people "*Shīr Bahā*", and in the language of others something else, not as dower or part of it, rather something in addition to dower, its law is that if it is taken by way of *Ju'ālah* (or remuneration) for a lawful service; there is no objection in its legality and lawfulness, rather the person rendering the service shall be entitled to it and the husband shall not have any right to demand it back once he has paid it.

If it is not by way of *Ju'ālah*, but it is paid by the husband for appeasing the close relative of the wife, even if it were for attracting his pleasure, appeasement or willingness, when what is intended is his willingness , or when the willingness of the daughter is dependent on his willingness, and for such considerations, the husband were paying the money willingly, then apparently it shall be lawful to receive it, but as long as it is intact, the husband may lawfully demand it back.

If, however, it is paid unwillingly by the husband and its payment is meant for the release of the girl where the close relative is an obstacle in the fulfilment of the mission despite her willingness for the marriage against the payment of the dower, it shall be unlawful to receive and get hold of it; and it shall be lawful for the husband to have recourse to him for its return even if it has already perished.

Problem # 10. If a marriage is contracted without dower, it shall be lawful for the spouses to agree later on something irrespective of its being equal to the wife's proper dower, or less or more than it, and call it dower, and it shall be as if mentioned in the contract.

Problem # 11. It is allowed to make the whole dower prompt [or *Muwajjal*], or without later date of payment, or *Mu'ajjal* or deferred, or make part of it prompt and part of it deferred. The wife shall be entitled to demand the prompt dower at any time provided the husband is capable and affluent. Rather she can refuse herself to surrender to his embraces and place herself at his disposal until she receives her prompt dower, irrespective of the husband being affluent or indigent. Of course, she shall not be allowed to refuse to surrender herself in case the whole of part of the dower were deferred, and she has already received part of it.

Problem # 12. It is lawful to mention dower in short in the contract, and leave the fixation of its amount and its determination to either of the spouses, as, suppose, when the wife says: "I have married myself to you on what you or I fix the amount of dower," and the man says : "I have accepted." If it is the

المهر» فقال: «قبلت» فان كان الحاكم الزوج جاز أن يحكم بما شاء ولم يتقدر في الكثرة و القلة مادام متمولاً، و إن كان الزوجة كان لها الحكم في طرف القلة بما شاءت مادام متمولاً، و أما في طرف الكثرة فلا يمضى حكمها في مازاد على مهر السنة، و هو خمسمائة درهم.

مسألة ١٣ - لو طلق قبل الدخول سقط نصف المهر المسمى و بقي نصفه، فان كان ديناً عليه و لم يكن قد دفعه برأت ذمته من النصف، و إن كان عيناً صارت مشتركة بينه و بينها، ولو كان دفعه إليها استعاد نصفه إن كان باقياً، و إن كان تالفاً استعاد نصف مثله إن كان مثلياً، و نصف قيمته إن كان قيمياً، و في حكم التلف نقله إلى الغير بناقل لازم، و مع النقل الجائز فالأحوط الرجوع و دفع نصف العين إن طالبها الزوج.

مسألة ١٤ - لو مات أحد الزوجين قبل الدخول فالأقوى تنصيف المهر كالطلاق خصوصاً في موت المرأة، والأحوط الأولى التصالح خصوصاً في موت الرجل.

مسألة ١٥ - تملك المرأة الصداق بنفس العقد و تستقر ملكية تمامه بالدخول فان طلقها قبله عاد إليه النصف و بقي لها النصف، فلها التصرف فيه بعد العقد بأنواعه، و بعد ما طلقها قبل الدخول كان له نصف ما وقع عليه العقد و لا يستحق من النماء السابق المنفصل شيئاً.

مسألة ١٦ - لو أبرأته من الصداق الذي كان عليه ثم طلقها قبل الدخول رجع بنصفه عليها، و كذا لو كان الصداق عيناً فوهبته إياها رجع بنصف مثلها إليها أوقيمة نصفها.

مسألة ١٧ - الدخول الذي يستقر به تمام المهر هو مطلق الوطء ولو دبراً، و إذا اختلف الزوجان بعد ما طلقها فادعت وقوع المواقعة و أنكرها فالقول قوله بيمينه، و له أن يدفع اليمين عن نفسه بإقامة البينة على العدم إن أمكن، كما إذا ادعت المواقعة قبلاً و كانت بكراً و عنده بينة على بقاء بكارتها.

مسألة ١٨ - لو اختلفا في أصل المهر فادعت الزوجة وأنكر الزوج فان كان

husband who is to fix the amount, it shall be lawful for him to fix any amount he likes whether small or big as long as it is in the form of property that can be owned.

If it is the wife who is to fix the amount of dower, she shall be entitled to fix the amount towards smallness as she likes unless it is in the form of property that can be owned. But as to the higher amount, she shall not be allowed to fix it more than the *Mahr al-Sunnah*, which is equal to five hundred Dirhams.

Problem # 13. If a man divorces his wife before consummation, half of the prescribed dower is dropped and only half of it remains. If the husband owes the dower to the wife and he happens not to have paid it to her, he shall be exonerated from the payment of half of it. If it is in substance, it shall become a joint property between him and her. If, however, he has already paid it to her, the husband may demand half of it back from her if it is intact. If it has already perished, he may demand the return of half of its substitute, if it can be substituted, or half of its price if it is something having a price. If it has been transferred to another by way of a binding transfer [like sale, etc.], it shall be treated as having perished. If there has been a lawful transfer [such as gift, etc.], it shall be more cautious to get it back and give half of its substance if the husband has demanded it so.

Problem # 14. If either of the spouses dies before consummation, according to the stronger opinion, the dower shall be reduced to half as in case of divorce, particularly in case of the wife's death, and it is more cautious to reach a compromise, particularly in case of the husband's death.

Problem # 15. The dower becomes the property of the wife by the mere conclusion of the contract , and her ownership of the whole is established by consummation. So if he divorces her before consummation, half of it shall return to him and the other half only remaining her property. She has full power to make its use in whatever form. After the man divorces her before consummation, he shall be entitled to half of the dower prescribed in the contract, but he shall not be entitled at all to the growth in it occurring separately previous to the divorce.

Problem # 16. If the wife excuses her dower owed by the husband, and then he divorces her before consummation, he shall have recourse to her for half of it. Likewise, if it were in substance, and she excuses it to him, he shall have recourse to her for half of its substitute or half of its price.

Problem # 17. The intercourse that establishes the whole of the dower is mere intercourse even if unnaturally [i.e., from her backside]. If the spouses differ after her divorce, the wife claiming performance of intercourse, while the husband denying it, his word shall be entertained if accompanied by his oath. He may avoid oath by adducing evidence in favour of non-performance of intercourse, if possible, as when she claims the performance of the intercourse in the natural order, while she were still a virgin, and he happens to have evidence to prove her still remaining a virgin.

Problem # 18. If the spouses differ as to the dower itself, so that the wife claims it and the husband denies it, then if it is before consummation, the husband's word shall carry if accompanied by his oath. If

قبل الدخول فالقول قوله بيمينه، و إن كان بعده كلفت بالتعيين بل لا يبعد عدم سماع الدعوى منها ما لم تفسر، و لا يسمع منها مجرد قولها لي عليه المهر ما لم تبيّن المقدار، فان فسرت و عينت بما لا يزيد على مهر المثل حكم لها عليه بما تدعيه، و لا يسمع منه إنكار أصل المهر، نعم لو ادعى سقوطه إما بالأداء أو الابراء يسمع منه، فان أقام البينة عليه ثبت مدعاه، و إلا فله عليها اليمين، فان حلفت على نفي الأداء أو الابراء تثبت دعواها و إن ردته على الزوج فحلف سقط دعواها، و إن نكل تثبت، و إن نكلت ردها الحاكم على الزوج، فان حلف تسقط دعواها، و إن نكل تثبت، هذا إذا كان ما تدعيه بمقدار مهر المثل أو أقلّ، و إن كان أكثر كان عليها الاثبات، و إلا فلها على الزوج اليمين.

مسألة ١٩ ـ لو توافقا على أصل المهر و اختلفا في مقداره كان القول قول الزوج بيمينه إلا إذا أثبتت الزوجة بالموازين الشرعية، و كذا إذا ادعت كون عين من الأعيان كدار أو بستان مهراً لها و أنكر الزوج، فان القول قوله بيمينه، وعليها البينة.

مسألة ٢٠ ـ لو اختلفا في التعجيل و التأجيل فقالت: إنه معجل و قال: بل مؤجل و لم يكن بينة كان القول قولها بيمينها، و كذا لو اختلفا في زيادة الأجل كما اذا ادعت أنه سنة و قال: إنه سنتان.

مسألة ٢١ ـ لو توافقا على المهر و ادعى تسليمه و لا بينة فالقول قولها بيمينها.

مسألة ٢٢ ـ لو دفع إليها قدر مهرها ثم اختلفا بعد ذلك فقالت: دفعته هبة و قال: بل دفعته صداقاً فلا يبعد التداعي، و تحتاج المسألة إلى زيادة تأمل.

مسألة ٢٣ ـ لو زوّج ولده الصغير فان كان للولد مال فالمهر على الولد، و إن لم يكن له مال فالمهر على عهدة الوالد، فلو مات الوالد أخرج المهر من أصل تركته، سواء بلغ الولد و أيسر أم لا، نعم لوتبرأمن ضمان العهدة في ضمن العقد برأمنه.

مسألة ٢٤ ـ لو دفع الوالد المهر الذي كان عليه من جهة إعسار الولد ثم بلغ الصبي فطلق قبل الدخول استعاد الولد نصف المهر و كان له دون الوالد.

it were after the consummation, she shall be required to specify it. Rather it shall not be far from not entertaining her claim if she fails to give its detail, so that her word shall not be carried by her mere statement that he owes her dower as long as she does not specify its amount. If she gives its details and specifies its amount that does not exceed her proper dower, judgement shall be given in her favour and against his claim, and his denial of the dower itself shall not be entertained. Of course, if he claims its forfeiture either by its payment or her excusing it, it shall carry. If he adduces evidence in favour of his claim, it shall carry; otherwise, he may ask her to take oath. If she takes oath in favour of non-payment or her excusing it, her claim shall be established. If he refuses to take oath, it shall be forwarded to the husband by the judge. If he takes the oath, her claim shall drop. If, however, he refuses to take oath, her claim shall be established. This is the case when what she claims is equal to or less than her proper dower, but if it were for more than that, she shall have to prove it; otherwise, she may ask the husband to take oath.

Problem # 19. If they agree as to the dower itself, but differ on its amount, the husband's word shall carry if accompanied by his oath, except when the wife proves her claim through the legal standards. The same shall be the case if the wife claims her dower to be a real estate like a house or a garden, while the husband denies it, the husband's word shall be entertained if accompanied by his oath, while she shall have to adduce evidence [in favour of her claim].

Problem # 20. If the spouses differ as to the dower being prompt or deferred, the wife claiming it to be prompt, while the husband claiming it to be deferred. If there is no evidence, the wife's word shall be entertained if followed by her oath. The same rule shall be followed if they differ as to the period, the wife claiming it to be a year, while the husband claiming it to be two years.

Problem # 21. If the spouses agree as to the dower itself, but the husband claims to have paid it without any evidence, in which case her word shall carry if accompanied by her oath.

Problem # 22. If the husband has paid the wife an amount equal to her dower, but later they differ, the wife claiming it to be a gift, while the husband asserting it to be her dower, then it is not far from being two claims. So it requires more consideration.

Problem # 23. If a man marries his minor son, then if the minor happens to own some property, the dower shall be payable by him. If, however, he has no property, then it shall be payable by the father. If the father dies, it shall be deducted from his actual inheritance, irrespective of the son having attained maturity and being affluent or not. Of course, if he has declared himself free from its liability at the time of contracting marriage, he shall be free from the liability.

Problem # 24. If the father has paid the dower owed by him due to the inability of the son, and then the son attains maturity and divorces his wife before consummation. The son shall be entitled to demand

خاتمة

في الشروط المذكورة في عقد النكاح

مسألة ١ ـ يجوز أن يشترط في ضمن عقد النكاح كل شرط سائغ ، و يجب على المشروط عليه الوفاء به كما في سائر العقود، لكن تخلفه أو تعذره لا يوجب الخيار في عقد النكاح بخلاف سائر العقود، نعم لو كان الشرط الالتزام بوجود صفة في أحد الزوجين مثل كون الزوجة باكرة أو كون الزوج مؤمناً غير مخالف فتبين خلافه أوجب الخيار كما مرت الاشارة إليه.

مسألة ٢ ـ إذا شرط في عقد النكاح ما يخالف المشروع مثل أن لا يمنعها من الخروج من المنزل متى شاءت و إلى أين شاءت، أولا يعطي حق ضرتها من المضاجعة و نحوها، و كذا لو شرط أن لا يتزوج عليها وأن لا يتسرى بطل الشرط و صح العقد و المهر و إن قلنا بأن الشرط الفاسد يفسد العقد.

مسألة ٣ ـ لو شرط أن لا يفتضها لزم الشرط، ولو أذنت بعد ذلك جاز من غير فرق بين النكاح الدائم و المنقطع.

مسألة ٤ ـ لو شرط أن لا يخرجها من بلدها أو أن يسكنها في بلد معلوم أو منزل مخصوص يلزم الشرط.

فصل في القسم والنشوز والشقاق

لكل واحد من الزوجين حق على صاحبه يجب عليه القيام به و إن كان حق الزوج أعظم، و من حقه عليها أن تطيعه و لا تعصيه و لا تخرج من بيتها إلا

the return of half dower, and it shall be his property instead of the father's.

CONCLUSION

Conditions mentioned in the Marriage Contract

Problem # 1. It is lawful to mention any legal condition in the marriage contract, and the other party shall be bound to fulfil them as is the case in other contracts, but failure to fulfil it or forwarding some excuse for it shall not induce the right of option to cancel it contrary to the other contracts.

Of course, if the condition necessitated the existence of some quality in either of the spouses like the wife's being a virgin or the husband's being a *Mu'min* (or Shī'ah) and not an opponent [or a Sunnī], and later it transpires otherwise, it shall give rise to right of option, as already alluded to.

Problem # 2. If an unlawful condition is incorporated in the marriage contract as the husband shall not prevent her to leave the house whenever she likes and wherever she likes, or shall not give her co-wife the right to sleep with him, or the like, or that he would not marry another wife in her presence or have a slave-girl, the condition shall be declared null and void, but the contract and the dower shall remain intact, although we hold the opinion that an invalid condition invalidates the contract.

Problem # 3. If it is stipulated that the husband shall not deflower her, it shall be a binding condition.

If, however, later she allows him to do so, it shall be lawful, irrespective of the marriage being permanent or temporary.

Problem # 4. If it is stipulated that the husband shall take her away from her home town, or shall provide residence in a prescribed town or in a particular house, the condition shall be binding.

Chapter Seven - Allotment (of Nights), Contumacy and Discord (*Qism, Nushūz & Shiqāq*)

Each of the spouses has an obligation on his/her partner that he/she is bound to fulfil, though the husband's obligation on the wife is greater. His obligation on her includes that she must obey him and must not disobey him and not go out of his house except with his permission, even to visit her

باذنه ولو إلى أهلها حتى لعيادة والدها أو في عزائه، بل ورد أن ليس لها أمر مع زوجها في صدقة و لا هبة و لا نذر في مالها إلا باذنه إلا في حج أو زكاة أو بر والديها أو صلة قرابتها، و تفصيل ذلك كله موكول إلى محله، و أما حقها عليه فهو أن يشبعها و يكسوها، و أن يغفر لها إذا جهلت و لا يقبح لها وجهاً كما ورد في الأخبار، و التفصيل موكول إلى محله.

مسألة ١ ـ من كانت له زوجة واحدة ليس لها عليه حق المبيت عندها والمضاجعة معها في كل ليلة، بل و لا في كل أربع ليال ليلة على الأقوى، بل القدر اللازم أن لا يهجرها ولا يذرها كالمعلقة لا هي ذات بعل و لا مطلقة، نعم لها عليه حق المواقعة في كل أربعة أشهر مرة كما مر، و إن كانت عنده أكثر من واحدة فان بات عند إحداهن يجب عليه أن يبيت عند غيرها أيضاً، فان كن أربع و بات عند إحداهن طاف على غيرها لكل منهن ليلة، و لا يفضل بعضهن على بعض، و إن لم تكن أربع يجوز له تفضل بعضهن، فان تك عنده مرأتان يجوز له أن يأتي إحداهما ثلاث ليال و الأخرى ليلة، و إن تك ثلاث فله أن يأتي إحداهن ليلتين والليلتان الأخريان للأخريين، و المشهور أنه إذا كانت عنده زوجة واحدة كانت لها في كل أربع ليال ليلة و له ثلاث ليال، و إن كانت عنده زوجات متعددة يجب عليه القسم بينهن في كل أربع ليال، فان كانت عنده أربع كانت لكل منهن ليلة، فاذا تم الدور يجب عليه الابتداء باحداهن و إتمام الدور و هكذا، فليس له ليلة، بل جميع لياليه لزوجاته، و إن كانت له زوجتان فلهما ليلتان في كل أربع و ليلتان له، و إن كانت ثلاث فلهن ثلاث والفاضل له، و العمل به أحوط خصوصاً في أكثر من واحدة، و الأقوى ما تقدم خصوصاً في الواحدة.

مسألة ٢ ـ يختص وجوب المبيت و المضاجعة فيما قلنا به بالدائمة، فليس للمتمتع بها هذا الحق واحدة كانت أو متعددة.

مسألة ٣ ـ في كل ليلة كان للمرأة، حق المبيت يجوز لها أن ترفع اليد عنه و

family members or even for enquiring about the health of her ailing father, or attending his condolence meeting.

Rather it has come down in the traditions that she is not allowed even to give charity or a free gift or fulfil a vow out of her property except with the permission of her husband, except in the performance of Ḥajj, Zakāt or spending on her parents or gift to her close relatives, the details of each of which shall be given in its respective place.

As regards her right on the husband, it is that he must feed her to her fill and clothe her [properly], excuse her when she forgets something, or frown on her, as has been mentioned in reports, the details of which are deferred to be mentioned in its place.

[I – Allotment (of Nights)]

Problem # 1. If a man has a single wife, she has no right to demand from him pass the night and sleep with her every night, rather not even one in every four nights, according to the stronger opinion, rather up to what is necessary that he should not abandon and forsake her like one having no husband or a divorcee. Of course, she has the obligation on him to perform intercourse with her once in every four months, as already mentioned. If, however, a man has more than one wife, if the husband passes the night with one of them, he is obliged to pass a night with the other as well. If he has four wives, and has passed one night with one of them, he should make a round and pass a night with each of them, and should not prefer one over others.

If he has not four wives, he may give preference to some of them. If he has two wives, he may pass three nights with one and a single night with another. If he has three wives, he may pass two nights with one of them and two other nights with the other two. According to the prevalent opinion, if a man has a single wife, one night in every four nights shall belong to her, and the other three nights shall be at his own disposal. If he has several wives, he is bound to divide all the four nights among them. If he has four wives, each of them shall have one night. When the round is complete, he shall be bound to begin the round with one of them and complete the round in the same way, so that no night shall belong to him, rather all the nights shall belong to his wives.

If he has two wives, two nights in every four nights shall belong to them, and two nights shall belong to him. If there are three wives, three nights shall belong to them, and the remaining night to him. It is more cautious to act upon it particularly when he has more than one wife, and according to the stronger opinion, he must act as mentioned particularly when he has a single wife.

Problem # 2. The obligation for passing the night and sleeping as mentioned by us is meant exclusively for a permanent wife, but is not meant for a temporary wife. This is an obligation whether he a single wife or several wives.

Problem # 3. A wife may delegate the night belonging to her to her husband to spend it as he likes. If she delegates it to a co-wife, it shall be the latter's right.

تهبه للزوج ليصرف ليله فيما يشاء، و أن تهبه للضرة فيصير الحق لها.

مسألة ٤ ـ تختص البكر أول عرسها بسبع ليال و الثيب بثلاث يجوز تفضيلهما بذلك على غيرهما، و لا يجب عليه أن يقضي تلك الليالي لنسائه القديمة.

مسألة ٥ ـ لا قسمة للصغيرة و لا للمجنونة المطبقة و لا لذات الأدوار حين دور جنونها و لا للناشزة، و تسقط القسمة و حق المضاجعة بالسفر، و ليس عليه القضاء.

مسألة ٦ ـ لو شرع في القسمة بين نسائه كان له الابتداء بأيّ منهن و بعد ذلك بأيّ من البقية و هكذا و إن كان الأحوط الأولى التعيين بالقرعة سيما ما عدا الأولى.

مسألة ٧ ـ يستحب التسوية بين الزوجات في الانفاق و الالتفات و إطلاق الوجه و المواقعه، و أن يكون في صبيحة كل ليلة عند صاحبتها، و أن يأذن لها في حضور موت أبيها و أمها و إن كان له منعها عنه و عن عيادتهما فضلاً عن عيادة غيرهما، و عن الخروج من منزله إلا لحق واجب.

القول في النشوز

و هو في الزوجة خروجها عن طاعة الزوج الواجبة عليها من عدم تمكين نفسها و عدم إزالة المنفرات المضادة للتمتع و الالتذاذ بها، بل و ترك التنظيف و التزيين مع اقتضاء الزوج لها، و كذا خروجها من بيته من دون إذنه و غير ذلك، و لا يتحقق النشوز بترك طاعته فيما ليست بواجبة عليها، فلو امتنعت من خدمات البيت و حوائجه التي لا تتعلق بالاستمتاع من الكنس أو الخياطة أو الطبخ أو غير ذلك حتى سقي الماء و تمهيد الفراش لم يتحقق النشوز.

مسألة ١ ـ لو ظهرت منها أمارات النشوز و الطغيان بسبب تغيير عادتها معه في القول أو الفعل بأن تجيبه بكلام خشن بعد ما كان بكلام لين أو أن تظهر عبوساً و

Problem # 4. (If a man has more than one wife), he should reserve seven nights for a virgin for the consummation of his nuptials, and three nights for a woman who has lost her virginity. It is lawful for him to give preference to such wives over others, and he is not bound to make up for the deficiency of those nights to the wives he already has.

Problem # 5. A minor wife is not entitled to a share in the partition of nights, nor a constantly insane wife, or one having periodical attacks of insanity during the attack of insanity, or a rebellious wife. The right of sleeping together is also dropped by the husband's going on journey, and he is not bound to make up for the deficiency.

Problem # 6. A husband is at liberty to start the partition of nights with any of his wives, and select any of the rest for the next nights, and so on, although it is more cautious to make the selection by casting lots, particularly after excluding the first.

Problem # 7. It is approved to observe equality between the wives in relation to maintenance, attention, pleasant looks and sexual intercourse, and to be with the wife in the morning of every night belonging to her, allow her to attend the funeral ceremonies of her father and mother, although he may lawfully forbid her from it, or visiting her ailing father and mother to enquire about their health not to speak of visiting others than them [to enquire about their health] , or to go out of his house except for some unavoidable business.

II- Contumacy (*Nushūz*)

In case of a wife, *Nushūz*, or contumacy means her disobedience to her husband in maters obligatory on her like failure to surrender herself to the embraces of the husband or non-avoidance of the things abhorrent for enjoyment and pleasure with her, or giving up cleaning and adorn herself despite her husband's demand, as also going out of his house without the husband's permission, etc.

Contumacy does not take place in disobeying him in matters not obligatory on her.

So if she refuses to perform domestic service or other works not related to the obligation of providing enjoyment like sweeping, tailoring, cooking, etc., even supplying water or spreading bed.

Problem # 1. If there appear the signs of her contumacy and rebellion due to the change in her habits with him in words or deeds, as when she gives a harsh reply to soft words, or appears scowling with a frowning face, sluggish and growling, etc., while she was otherwise in the past, he

تقطباً في وجهه و تثاقلاً و دمدمةبعد أن كانت على خلاف ذلك وغير ذلك يعظها، فان لم تسمع يتحقق النشوز بخروجها عن طاعته فيما يرجع إلى الاستمتاع، فحينئذ جاز له هجرها في المضجع إما بأن يحوّل إليها ظهره في الفراش أو يعتزل عن فراشها، فاذا هجرها و لم ترجع و أصرت عليه جاز له ضربها، و يقتصر على ما يؤمل معه رجوعها فلا يجوز الزيادة عليه مع حصول الغرض به، و إلا تدرّج إلى الأقوى فالأقوى ما لم يكن مدمياً و لا شديداً مؤثراً في اسوداد بدنها أو احمراره، و اللازم أن يكون ذلك بقصد الاصلاح لا التشفي و الانتقام، ولو حصل بالضرب جناية وجب الغرم.

مسألة ٢ ـ كما يكون النشوز من قبل الزوجة يكون من طرف الزوج أيضاً بتعديه عليها، و عدم القيام بحقوقها الواجبة، فاذا ظهر منه النشوز بمنع حقوقها من قسم و نفقة و نحوهما فلها المطالبة بها و وعظها إياه، فان لم يؤثر رفعت أمر ها إلى الحاكم فيلزمه بها، وليس لها هجره و لا ضربه، و إذا اطلع الحاكم على نشوزه و تعديه نهاه عن فعل ما يحرم عليه و أمره بفعل ما يجب، فان نفع و إلا عزرّه بما يراه، و له أيضاً الانفاق من ماله مع امتناعه من ذلك ولو ببيع عقاره إذا توقف عليه.

مسألة ٣ ـ لو ترك الزوج بعض حقوقها الغير الواجبة أو همّ بطلاقها لكراهته لها لكبر سنها أو غيره أو همّ بالتزويج عليها فبذلت له مالاً أو بعض حقوقها الواجبة من قسم أو نفقة استمالة له صح و حلّ له ذلك ، و أما لو ترك بعض حقوقها الواجبة أو آذاها بالضرب أو الشتم و غير ذلك فبذلت مالاً أو تركت بعض حقوقها ليقوم بما ترك من حقها أو ليمسك عن أذيتها أو ليخلعها فتخلص من يده حرم عليه ما بذلت و إن لم يكن من قصده إلجاؤها بالبذل على الأقوى.

مسألة ٤ ـ لو وقع النشوز من الزوجين بحيث خيف الشقاق و الفراق بينهما وانجرّ أمر هما إلى الحاكم بعث حكمين، حكماً من جانبه و حكما من جانبها للاصلاح و رفع الشقاق بما رأياه من الصلاح من الجمع أو الفراق، و يجب عليهما

should admonish her. If she does not listen to him, it shall amount to disobeying him in matters relating to providing him enjoyment. In such case, he is allowed to leave her alone in the bed room, either by turning his back to her in the bed or leave her alone in her bed. If he leaves her alone, but she fails to return to obedience and persists in her contumacy, the husband shall be allowed to give her a beating, confining it to the extent tht is expected to make her return to obedience , but it is not lawful to exceed from what is required to serve the purpose. Otherwise, he may adopt tougher ways not resulting in bleeding and not so tough as to turning parts of her body black or red. He is bound to adopt such method in order to reform her not to satisfy his anger or retaliate. If the beating results in physical harm [to the wife], the husband shall be liable to pay a fine (*gharm*) for it.

Problem # 2. As contumacy may be committed by a wife, so also it may be committed by the husband by behaving unjustly with her and failing to fulfil his obligations to her. In the even of appearance of such contumacy on the part of the husband by denying her rights like partition of nights, maintenance, or the like, the wife shall be entitled to demand them from him and even admonish him. If it does not prove effective, he may refer her case to the judge, who would make him bound to fulfil the obligations. But she cannot abandon him or give a beating to him. When the judge comes to know of the contumacy injustice on the part of the husband, he shall forbid him from what he is forbidden to do, and do what is obligatory on him. If it proves useful' [well and good]; otherwise, he may chastise him as he deems necessary. The judge may also spend on her maintain out of his property in case of his failure, even by disposing of piece of his real estate when he cannot do without it.

Problem # 3. If the husband fails to fulfil some of her non-obligatory rights, or intends to divorce her for her repulsion or old age, etc., or to bring another wife upon her, she may spend some money or release some of her obligatory rights like partition of nights and maintenance in order to appease him, it shall be valid, and he may lawfully accept it. If, however, he fails to fulfil some of her obligatory rights or hurts her by beating or abusing her, etc. and she pays some money or surrenders some of her rights in order to persuade him to fulfil her forsaken rights or to dissuade him from hurting her or release her by way of *Khul'* in order to get rid of him, whatever ransom is surrendered by her shall be unlawful to him, even if he did not intend to force her to pay the ransom, according to the stronger opinion.

[III – Discord (*Shiqāq*)]

Problem # 4. If contumacy is committed by both the spouses in a way that there is apprehension of a discord and separation between them, and the matter is referred to the judge, he shall appoint two arbitrators, one on behalf of the husband and another on behalf of the wife for bringing about conciliation, and removal of the discord in whatever way they deem advisable by continuance of their union or bringing about separation. They shall be bound to make necessary investigation and enquiry about their positions, and the causes that has lead to such situation between them, and then make

البحث و الاجتهاد في حالهما و فيما هو السبب و العلة لحصول ذلك بينهما ثم يسعيان في أمرهما، فكلما استقر عليه رأيهما و حكما به نفذ على الزوجين و يلزم عليهما الرضا به بشرط كونه سائغاً، كما لو شرطا على الزوج أن يسكن الزوجة في البلد الفلاني أو في مسكن مخصوص أو عند أبويها أو لا يسكن معها أمه أو أخته ولو في بيت منفرد، أو لا يسكن معها ضرتها في دار واحدة و نحو ذلك، أو شرطا عليها أن تؤجله بالمهر الحال إلى أجل، أو ترد عليه ما قبضته قرضاً و نحو ذلك، بخلاف ما إذا كان غير سائغ كما إذا شرطا عليه ترك بعض حقوق الضرة من قسم أو نفقة أو رخصة المرأة في خروجها عن بيته حيث شاءت و أين شاءت و نحو ذلك.

مسألة ٥ - لو اجتمع الحكمان على التفريق ليس لهما ذلك إلا إذا شرطا عليهما حين بعثهما بأنهما إن شاءا جمعا و إن شاءا فرقا، و حيث إن التفريق لا يكون إلا بالطلاق فلابد من وقوعه عند اجتماع شرائطه.

مسألة ٦ - الأولى بل الأحوط أن يكون الحكمان من أهل الطرفين بأن يكون حكم من أهله و حكم من أهلها، فان لم يكن لهما أهل أو لم يكن أهلهما أهلاً لهذا الأمر تعين من غيرهم، و لا يعتبر أن يكون من جانب كل منهما حكم واحد، بل لو اقتضت المصلحة بعث أزيد تعين.

مسألة ٧ - ينبغي للحكمين إخلاص النية و قصد الاصلاح، فمن حسنت نيته فيما تحراه أصلح الله مسعاه كما يرشد إلى ذلك قوله جلّ شأنه في هذا المقام: «إن يريدا إصلاحاً يوفق الله بينهما».

فصل في أحكام الأولاد والولادة

مسألة ١ - إنما يلحق ما ولدته المرأة بزوجها بشروط: الدخول مع الانزال او الانزال في الفرج و حواليه، أو دخول منيّه فيه بأيّ نحو كان، و في الدخول بلا إنزال إشكال، و مضي ستة أشهر أو أكثر من حين الوطء إلى زمن الولادة، و أن

endeavours advisable in their case.

Then whatever is the final solution or decision in their opinion shall be enforced in respect of both the spouses and it shall be binding on them to consent to it provided it is legal, as when they make it a condition for he husband to provide residence to the wife in a specific place, or in a specific house, or with her parents, or not to let his mother or sister to live with her even if in an independent house, or not to let her co-wife to live in the same house, or the like, or they make it a condition that she must change her prompt dower to a deferred one, or return to the husband what loan she had taken from him, or the like, contrary to what is illegal as when they make it a condition for the husband to give up some of the rights of the co-wife like partition of nights, maintenance or permission for the wife for going out of his house as and wherever she likes, or he likes.

Problem # 5. If both the arbitrators agree to bringing about separation between the spouses, they shall not be entitled to do so, except when it was stipulated at the time of their appointment as arbitrators that if they like they may decide that both the spouses should continue as husband or wife or they should separate from each other, and as the separation is not effected except by giving divorce, it is indispensable for it to take place after fulfilment of all its requisite conditions.

Problem # 6. It is preferable, rather more cautious, that both the arbitrators should belong to the family of the spouses, so that one of them must belong to the family of the husband and the other to the family of the wife. If they have no members of their family, or the members of their family are not competent to act as arbitrators, they shall be appointed from others than the family members. It is not allowed to have a single arbitrator on behalf of both the parties. Rather if necessary more than one can be appointed on behalf of each of the spouses.

Problem # 7. Both the arbitrators must have sincerity of purpose and intention to bring about conciliation. Whosoever has good intentions in what he endeavours, Allāh makes his efforts fruitful, as is alluded to in the words of Allah, whose Grace is Exalted, in this respect; "If both of them [i.e., the arbitrators] intend to bring about conciliation, Allāh shall make them successful." (*Sūrah Al-Nisā'* IV: 35)

Chapter Eight - Laws relating to Children and their Birth

Problem # 1. A child born to a woman appertains to her husband on the following conditions:

Firstly, penetration [of the husband's organ into the woman's organ] followed by discharge of semen, or its discharge in the woman's organ or around it, or entrance of the husband's semen into the woman's organ in whatever way.In case of penetration not followed by discharge of semen, there is hesitation [in affiliation of the child to the husband].

Secondly, passage of six months or more since the coition by husband till the time of delivery.

Thirdly, lapse of not more than the longest period of gestation [from the time of coition to the birth of the

لا تتجاوز عن أقصى مدة الحمل، و في كونه تسعة أشهر إشكال، بل الأرجح بالنظر أن يكون الأقصى سنة، فلو لم يدخل بها أصلاً و لم ينزل في فرجها أو حواليه بحيث يحتمل الجذب و لم يدخل المني فيه بنحو من الأنحاء لم يلحق به قطعاً، بل يجب نفيه عنه، و كذا لو دخل بها و أنزل وجاءت بولد حي كامل لأقل من ستة أشهر من حين الدخول و نحوه أو جاءت به و قد مضى من حين وطئه و نحوه أزيد من أقصى الحمل، كما إذا اعتزلها أو غاب عنها أزيد منه و ولدت بعده.

مسألة ٢ ـ إذا تحققت الشروط المتقدمة لحق الولد به، و لا يجوز له نفيه و إن وطأها واطىء فجوراً فضلاً عما لو اتهمها به، و لا ينتفي عنه لو نفاه إن كان العقد دائماً إلا باللعان، بخلاف ما إذا كان العقد منقطعاً وجاءت بولد أمكن إلحاقه به، فانه و إن لم يجز له نفيه لكن لو نفاه ينتفي منه ظاهراً من غير لعان، لكن عليه اليمين مع دعواها أو دعوى الولد النسب.

مسألة ٣ ـ لا يجوز نفي الولد لأجل العزل، فلو نفاه لم ينتف إلا باللعان.

مسألة ٤ ـ الموطوءة بشبهة كما إذا وطأ أجنبية بظن أنها زوجته يلحق ولدها بالواطىء بشرط أن تكون ولادته لستة أشهر من حين الوطء أو أكثر، و أن لا يتجاوز عن أقصى الحمل، و بشرط أن لا تكون تحت زوج مع إمكان التولد منه بشروطه.

مسألة ٥ ـ لو اختلفا في الدخول الموجب لإلحاق الولد و عدمه فادعته المرأة ليلحق الولد به و أنكره أو اختلفا في ولادته فنفاها الزوج و ادعى أنها أتت به من خارج فالقول قوله بيمينه، ولو اتفقا في الدخول والولادة و اختلفا في المدة فادعى ولادتها لدون ستة أشهر أو لأزيد من أقصى الحمل و ادعت خلافه فالقول قولها بيمينها، و يلحق الولد به و لا ينتفي عنه إلا باللعان.

مسألة ٦ ـ لو طلق زوجته المدخول بها فاعتدت و تزوجت ثم أتت بولد فان لم يمكن لحوقه بالثاني و أمكن لحوقه بالأول كما إذا ولدته لدون ستة أشهر من وطء

child]. There is hesitation in nine months being the longest period of gestation, rather the most preferable longest period of gestation is one year. If the man has not had intercourse with the woman at all, nor has discharged his semen in the woman's organ or around it in a way that there is likelihood of its being swallowed by her organ, nor has the [husband's] semen entered into her organ in any way, the child shall not be affiliated with the husband absolutely. Rather the husband shall be bound to repudiate the child's affiliation to himself. The same shall be the rule of the husband has enjoyed the woman and has discharged his semen, but she gives birth to a complete child in less than six months since his coition or the like, or the child is born to her after the lapse of more than the maximum period of gestation since his coition or the like, as when he has left her or has been away from her for more than that period and she gives birth to the child after its lapse.

Problem # 2. If all the above mentioned conditions have been fulfilled, the child shall be affiliated to the husband, and he cannot disown it, even if an adulterer has done wickedly with the woman not to speak of the case when he himself slanders her with it. The child shall not be dissociated from him, except by way of *Li'ān*, even if he disowns it, in case the marriage was permanent, contrary to the case when the marriage was temporary, and she gave birth to a child with the likelihood of its being affiliated to the husband even then he would be entitled to do so, though it is not lawful for him to disown the child, yet if he disowns the child, it shall apparently be dissociated from him without going through the process of *Li'ān*, but he shall be required to take oath in the event of his claim [of disavowal] , or when the child claims the parentage.

Problem # 3. Repudiation of the child is not allowed due to practising *'Azl*, or *extrahere ante emissionem eminis*. If the father disowns the child, it shall not be dissociated from him except by way of *Li'ān*.

Problem # 4. If a woman is enjoyed under a semblance of right, as when a man enjoys a stranger woman under the impression that she is his wife, her child shall be affiliated to the cohabiter provided it is born in six months or more since the coition and the maximum period of gestation has not been over, and also on the condition that she had not been in the wedlock of another husband with the likelihood of the child belonging to him with the relevant conditions.

Problem # 5. If the spouses disagree on the coition leading to the child's affiliation or otherwise, so that the wife claims the performance of the intercourse that the child may belong to the husband, while he denies it, or they disagree on its parentage that is repudiated by the husband claiming that she has brought it from outside, the husband's word shall carry followed by his oath. If they agree as to the coition and parentage, but disagree on the period, the father claiming its birth to be in less than six months or more than the longest period of gestation, while she claims otherwise, then her word shall be entertained accompanied by her oath, and the child shall be affiliated to the husband and shall not be dissociated from him except by way of *Li'ān*.

Problem # 6. If a man divorces his wife whom he has enjoyed, and after observing *'Iddah* she marries another husband, and then gives birth to a child that cannot be affiliated with the second , but can be

الثاني و لتمامها من غير تجاوز عن أقصى الحمل من وطء الأول فهو للأول، و تبيّن بطلان نكاح الثاني، لتبين وقوعه في العدة و حرمت عليه مؤبداً لوطئه إياها، و إن انعكس الأمر بأن أمكن لحوقه بالثاني دون الأول لحق بالثاني، بأن ولدته لأزيد من أكثر الحمل من وطء الأول و لأقل الحمل إلى الأقصى من وطء الثاني، و إن لم يمكن لحوقه بأحدهما بأن ولدته لأزيد من أقصى الحمل من وطء الأول ولدون ستة أشهر من وطء الثاني انتفى منهما، و إن أمكن إلحاقه بهما فهو للثاني.

مسألة ۷ ـ لو طلقها ثم بعد ذلك وطئت بشبهة ثم أتت بولد فهو كالتزويج بعد العدة، فيجيء فيه الصور الأربعة المتقدمة حتى الصورة الأخيرة، وهي ما إذا أمكن اللحوق بكل منهما، فانه يلحق بالأخير هنا أيضاً.

مسألة ۸ ـ لو كانت تحت زوج فوطأها شخص آخر بشبهة فأتت بولد فان أمكن لحوقه بأحدهما دون الآخر يلحق به، و إن لم يمكن اللحوق بهما انتفى عنهما، و إن أمكن لحوقه بكل منهما أقرع بينهما.

القول في أحكام الولادة وما يلحق بها

للولادة و المولود سنن و آداب بعضها واجبة و بعضها مندوبة نذكر مهماتها.

مسألة ۱ ـ يجب استقلال النساء في شؤون المرأة حين وضعها دون الرجال إذا استلزم اطلاعهم على ما يحرم عليهم إلا مع عدم النساء و مست الضرورة بذلك، نعم لا بأس بالزوج و إن وجدت النساء.

مسألة ۲ ـ يستحب غسل المولود عند وضعه مع الأمن من الضرر و الأذان في أذنه اليمنى و الاقامة في اليسرى، و تحنيكه بماء الفرات و تربة سيد الشهداء عليه السلام، و تسميته بالأسماء المستحسنة، فان ذلك من حق الولد على الوالد، و أفضلها ما يتضمن العبودية لله جل شأنه كعبدالله و عبدالرحيم و عبدالرحمان. و

affiliated with the first husband as when it is born in less than six months since the coition by the second, and without completing the maximum period of gestation since the coition by the first, then it shall belong to the first, and it shall be indicative of the voidance of her marriage with the second, due to its being contracted during her *'Iddah*, and the woman shall thereby be rendered perpetually unlawful to the second due to his having coition with her. If, however, the case is reverse, as when it can be affiliated to the second excluding the first, it shall be affiliated to the second, as when it is born after the lapse of the maximum period of gestation since the coition by the first husband within the shortest period since the coition by the second. If, however, it cannot be affiliated to either of them, so that it is born after the lapse of the longest period of gestation since the coition by the first husband and in less than six months since the coition by the second, it shall be dissociated from both. If, however, it can be affiliated to both of them, it shall be affiliated to the second.

Problem # 7. If a man divorces his wife, and then enjoys her under a semblance of right, and then the woman gives birth to a child, it shall be like the case of marriage after her *'Iddah* is over. All the four probabilities mentioned above may be applicable in this case too including the last one. This is when there is likelihood of its affiliation to both, so that child shall be affiliated to the second one here too.

Problem # 8. If a woman is in the wedlock of a man, and she is enjoyed by another under a semblance of right, and then gives birth to a child, who can be affiliated to one of them excluding the other, it shall be affiliated to him. If it cannot be affiliated to either of them, it shall be dissociated from both. If it can be affiliated to both, it shall be decided by casting lots.

Chapter Nine – Rules & Etiquettes relating to Child's Birth and its Appendages

There are some rules and etiquettes relating to the birth of a child, some of which are obligatory, while others are approved. Here are some of the important ones.

Problem # 1. At the time of the birth of the child, it is obligatory that the matters relating to women should be handled by women independently without the help of men, when there is apprehension that they shall have knowledge about things prohibited to them, except when women are not available and there is pressing need of its performance by men in emergency. Of course, there is no objection if the husband deals with such things, even if women are available.

Problem # 2. It is approved to wash the child after it is born provided it is safe from harm to it, and to pronounce call to prayers (*Adhān*) in its right ear and the call to stand for prayers (*Iqāmat*) in its left ear, and rub the water of River Euphrates and the dust of the grave of the Chief of Martyrs,(i.e., Imām Ḥusayn), A.S., and give it one of the desirable names, being a duty of the father to the child, the most preferable being a name indicating devotion to Allāh, whose Grace is Exalted, like 'Abdullāh, 'Abdul

نحوها، و يليها أسماء الأنبياء و الأئمة عليهم السلام و أفضلها محمد، بل يكره ترك التسمية به إن ولد له أربعة أولاد، و يكره أن يكنيه أبا القاسم إن كان اسمه محمد، و يستحب أن يحلق رأس الولد يوم السابع، و يتصدق بوزن شعره ذهباً أو فضة، و يكره أن يحلق من رأسه موضع و يترك موضع.

مسألة ٣ ـ تستحب الوليمة عند الولادة، و هي إحدى الخمس التي سنّ فيها الوليمة، كما أن إحداها عند الختان، و لا يعتبر إيقاع الأولى يوم الولادة، فلا بأس بتأخيرها عنه بأيام قلائل، و الظاهر أنه ان ختن في اليوم السابع أو قبله فأولم في يوم الختان بقصدهما تتأدى السنتان.

مسألة ٤ ـ يجب ختان الذكور، و يستحب إيقاعه في اليوم السابع، و يجوز التأخير عنه، و إن تأخر إلى ما بعد البلوغ يجب عليه أن يختن نفسه حتى أن الكافر إذا أسلم غير مختون يجب عليه الختان و إن طعن في السن و لا يجب على الولي أن يختن الصبي إلى زمان بلوغه، فان بلغ بلا ختان يجب على نفسه و إن كان الأحوط أن يختنه.

مسألة ٥ ـ الختان واجب لنفسه، و شرط لصحة طوافه في حج أو عمرة واجبين أو مندوبين، وليس شرطاً في صحة الصلاة على الأقوى فضلاً عن سائر العبادات.

مسألة ٦ ـ الأحوط في الختان قطع الغلاف بحيث يظهر تمام الحشفة كما هو المتعارف، بل لا يخلو من قوة.

مسألة ٧ ـ لا بأس بكون الختّان كافراً حربياً أو ذمياً، فلا يعتبر فيه الاسلام.

مسألة ٨ ـ لو ولد الصبي مختوناً سقط الختان و إن استحب إمرار الموسى على المحل لاصابة السنة.

مسألة ٩ ـ من المستحبات الأكيدة العقيقة للذكر و الأنثى، و يستحب أن يعق عن الذكر ذكراً و عن الأنثى أنثى، و أن تكون يوم السابع، و إن تأخرت عنه لعذر أو لغير عذر لم تسقط، بل لو لم يعق عنه حتى بلغ عقّ عن نفسه، بل لو لم

Raḥīm , 'Abdul Raḥmān or the like , and that is followed by the names of the Prophets and Imāms, A.S., the most preferable being Muḥammad, and if a man has four sons, it is disapproved not to name one of them as Muḥammad, or to call the child with the *Kunniyah* (or surname) of Abul Qāsim when his name were Muḥammad. It is approved to shave the head of the child on the seventh day, and to give in charity gold or silver equal in weight with its hair. It is disapproved to shave the hair of its head from one side leaving the other unshaved.

Problem # 3. It is approved to give a feast (*Valīmah*) on the birth of a child, being one of the five events when giving a feast is approved by tradition (*Sunnah)*, as one of the other being at the time of circumcision. It is not a condition to give the feast for the birth on the day of the child's birth, as there is no objection if it is delayed by a few days. Apparently if a child's circumcision is performed on the seventh day or earlier, and gives feast for the child's birth as well as its circumcision , he shall be considered to have performed both the approved acts.

Problem # 4. It is obligatory to have the male child circumcised, and it is approved to have it done on the seventh day of the child's birth, though a delay in it is permissible. If it is delayed until the maturity of the child, it shall be obligatory on the child to get himself circumcised. It is obligatory even on an uncircumcised infidel to have him circumcised after embracing Islam, even if he has grown old. It is not obligatory on the guardian to have the child circumcised before its attaining maturity.

So if the child attains maturity and it is not circumcised, the child shall be bound to get himself circumcised, though it is more cautious for the guardian to have him circumcised.

Problem # 5. Circumcision is obligatory in itself, and also a condition for the validity of the circumlocution (*Ṭawāf*) in an obligatory or approved Ḥajj or 'Umrah, but it is not a condition for the validity of prayers, let alone the other types of worships.

Problem # 6. It is more cautious to cut the covering skin of the glans penis in a way that it may become completely visible, acording to the prevalent custom, rather it is not devoid of force.

Problem # 7. There is no objection if the person performing the circumcision is a Ḥarbī infidel or a *Ḍhimmī*, and it is not a condition that he should be a Muslim.

Problem # 8. If a child is born duly circumcised, the condition of circumcision shall drop, though it is approved to rub the portion that is circumcised with a straight razor.

Problem # 9. One of the emphatically approved acts is the performance of *'Aqīqah* of the male and female child, and it is approved to sacrifice a male animal for a male child and a female animal for a

يعق عن نفسه حال حياته يستحب أن يعق عنه بعد موته، و لابد أن تكون من أحد الأنعام الثلاثة: الغنم ـ ضأناً كان أو معزاً ـ و البقر و الابل، و لا يجزي عنها التصدق بثمنها، قيل: يستحب أن تجتمع فيها شروط الأضحية من كونها سليمة من العيوب لا يكون سنها أقل من خمس سنين كاملة في الابل، و أقل من سنتين في البقر، و أقل من سنة كاملة في المعز، و أقل من سبعة شهور ف الضـأن، و هو لا يخلو من إشكال كما أن تعيين السنين بما ذكر لا يخلو بعضها من إشكال و الأمر سهل، و يستحب أن تخص القابلة بالرجل والورك ، و الافضل أن يخصها بالربع، و إن جمع بين الربع و الرجل و الورك بأن أعطاها الربع الذي هما فيه لا يبعد أن يكون عاملاً بالاستحبابين، و لو لم تكن قابلة أعطي الأم تتصدق به.

مسألة ١٠ ـ يتخير في العقيقة بين أن يفرقها لحماً أو مطبوخاً أو تطبخ و يدعى إليها جماعة من المؤمنين، و لا أقل من عشرة، و إن زاد فهو أفضل، و يأكلون منها و يدعون للولد، و لا بأس بطبخها على ماهو المتعارف و قد يقال:الأفضل طبخها بماء و ملح، و هو غير معلوم.

مسألة ١١ ـ لا يجب على الأم إرضاع ولدها لا مجاناً و لا بالأجرة مع عدم الانحصار بها، بل و مع الانحصار لو أمكن حفظ الولد بلبن و نحوه مع الأمن من الضرر عليه، كما أنه لا يجب عليها إرضاعه مجاناً و إن انحصر بها، بل لها المطالبة بأجرة الارضاع من مال الولد إن كان له مال، و من أبيه إن لم يكن له مال و كان الأب موسراً، نعم لو لم يكن للولد مال و لم يكن الأب و الجدّ و إن علا موسرين تعين على الأم إرضاعه مجاناً، إما بنفسها أو باستئجار مرضعة أخرى، أو بغيره من طرق الحفظ إن لم يكن مضراً له، و تكون الأجرة أو النفقة عليها.

مسألة ١٢ ـ الأم أحق بارضاع ولدها من غيرها إذا كانت متبرعة أو تطلب ما تطلب غيرها أو أنقص، و أما لو طلبت زيادة أو أجرة و وجدت متبرعة فللأب تسليمه إلى غيرها، و الأحوط عدم سقوط حق الحضانة الثابت للأم

female child, and that it should be performed on the seventh day of the birth of the child.

If it is delayed with or without excuse, it does not drop. Rather if it is not performed until the child attains maturity, he/she may perform it for himself. If he fails to perform himself during his lifetime, it is approved to perform it on his/her behalf after his/her death.

It is indispensable that the sacrificial animal must be from among one of the three, kinds, namely, a sheep or a goat, a cow and a camel. It is not allowed to pay the price instead of the animal. It is said by the jurists that it is approved that it should fulfil all the conditions required in a sacrificial animal in its being free from all defects, as in case of a camel its age should not be less than complete five years, complete two years in case of a cow and at least complete one year in case of sheep and at least seven months in case of a goat. It is not free from hesitation as the determination of the years as mentioned is sometimes not free from hesitation. *'Aqīqah* itself is quite easy. It is approved to give the midwife the trotters and legs of the animal, and it is better to give her one-fourth of the animal, and if one includes the trotters and legs with the one-fourth, so that he gives the fourth in which lie the trotters and legs, it shall not be far from fulfilling both the approved conditions. In the absence of a midwife, her share may be given to the mother for giving it in charity.

Problem # 10. The person performing the *'Aqīqah* is at liberty to distribute the sacrificial meat in the form of (uncooked) meat or cooked meat, or cook the meat and invite a group of believers, at least ten in number, or to be preferable even more , who may eat the meat and pray for the child. There is no objection in coking the meat according to the prevalent custom, though according to what is said it is preferable to cook it in water and salt, but it is not certain.

[Chapter Ten -Laws relating to Suckling (*Riḍā 'ah*)]

Problem # 11. It is not obligatory upon the mother to suckle her child, gratis or against remuneration, provided she is not the only person to feed it; rather even if she is only one to feed it, if the safety of the child is possible by giving it milk or the like without any risk of harm to it, as it is not obligatory upon her to suckle the child gratis, even if she is the only one to suckle it. Rather she is entitled to demand remuneration for suckling out of the property of the child, if it has any property, or out of the father's property, if the child has no property and the father is well-to-do. Of course, if the child has no property, and its father and grandfather, how high so ever, are also not well-to-do, it shall be obligatory on the mother to suckle it gratis, by herself, or by hiring another nurse, or in any other ways of protecting the child if they are not harmful for the child, and the payment of remuneration and maintenance shall be her liability.

Problem # 12. A mother has a better right to suckle her child than any other woman, if she offers to suckle free of charge, or demands what is demanded by others or less than that. If, however, she demands more, or demands remuneration while there is another woman who is ready to suckle the child free of charge, the father shall be at liberty to deliver the child to that woman.

أيضاً، لعدم التنافي بين سقوط حق الارضاع و ثبوت حق الحضانة.

مسألة ١٣ ـ لو ادعى الأب وجود متبرعة و أنكرت الأم ولم تكن البينة على وجودها فالقول قولها بيمينها.

مسألة ١٤ ـ يستحب أن يكون رضاع الصبي بلبن أمه، فانه أبرك من غيره، إلا إذا اقتضت بعض الجهات أولوية غيرها من حيث شرافتها و طيب لبنها و خباثة الأم.

مسألة ١٥ ـ كمال الرضاع حولان كاملان أربع و عشرون شهراً، و يجوز أن ينقص عن ذلك إلى ثلاثة شهور بأن يفطم على أحد و عشرين شهراً، و لا يجوز أن ينقص من ذلك مع الامكان و من غير ضرورة.

مسألة ١٦ ـ الأم أحق بحضانة الولد و تربيته و ما يتعلق بها من مصلحة حفظه مدة الرضاع أي الحولين إذا كانت حرة مسلمة عاقلة، ذكراً كان أو أنثى، سواء أرضعته هي بنفسها أو بغيرها، فلا يجوز للأب أن يأخذه في هذه المدة منها و إن فطمته على الأحوط، فاذا انقضت مدة الرضاع فالأب أحق بالذكر و الأم بالأنثى حتى تبلغ سبع سنين من عمرها ثم يكون الأب أحق بها، و إن فارق الأم بفسخ أو طلاق قبل أن تبلغ سبع سنين لم يسقط حقها ما لم تتزوج بالغير، فلو تزوجت سقط حقها عن الذكر و الأنثى و كانت الحضانة للأب، ولو فارقها الثاني لا يبعد عود حقها، و الأحوط التصالح و التسالم.

مسألة ١٧ ـ لو مات الاب بعد انتقال الحضانة إليه أو قبله كانت الأم أحق بحضانة الولد ـ و إن كانت مزوجة ذكراً كان أو أنثى ـ من وصي أبيه، و كذا من باقي أقاربه حتى أبي أبيه و أمه فضلاً عن غيرهما، كما أنه لو ماتت الأم في زمن حضانتها فالأب أحق بها من غيره، و إن فقد الأبوان فهي لأب الأب، و إذا عدم و لم يكن وصي له و لا للأب فلأقارب الولد على ترتيب مراتب الارث، الأقرب منهم يمنع الأبعد، و مع التعدد و التساوي في المرتبة و التشاح أقرع بينهم. و إذا وجد وصي لأحدهما ففي كون الأمر كذلك أو كونها للوصي ثم إلى الأقارب

According to the more cautious opinion, the right of custody established for the mother also is not forfeited, due to there being contradiction between the right of suckling and the right of custody.
Problem # 13. If the father claims that there is a woman offering to suckle the child gratis, and the mother denies it, but there is no evidence in favour of her existence, the word of the mother shall be entertained provided it is followed by her oath.

Problem # 14. It is approved that the suckling of the child be done with the milk of its mother, as it is more blessed that of the others, except when it is more advisable for some reasons of preference for the other woman like her nobility and better quality of her milk and the wickedness of the mother.

Problem # 15. The longest period of suckling is two complete years of twenty four months. lit is allowed to be reduced by three months, so that the child is weaned after twenty one months, but it is not allowed to reduce it further if possible, and in the absence of any emergency.

[Chapter Eleven -Laws relating to Custody of Children (*Hiḍānat*)]

Problem # 16. A mother has a better right to the custody of the child and to bring it up, and what relates to it like the consideration of its protection during the suckling period or two years if she were a free, Muslim and sane woman, irrespective of the child being a male or female, and whether she has suckled the child herself or by another woman. A father is not allowed to take the child from her during such period, even if she has weaned it, according to the more cautious opinion. When the period of fosterage is over, the father shall have a better right to the custody of a male child and a mother to that of a female child until she attains seven years of age, after which the father has a better right to her custody. If the mother is separated by dissolution of the marriage or a divorce before the female child attains seven years of age, the mother's right to the custody of the male or female child is forfeited, and it belongs to the father. If the second husband
Separates from her, her right of custody is not restored, though it is more cautious to reach a compromise and conciliation.

Problem # 17. If the father dies after the transfer of custody of the child to him or before it, the mother shall have a preferable right to the custody of the child than the father's executor, even if she is already married [to another husband], irrespective of the child being male or female.

Likewise, she shall have a better title to the custody of the child than the rest of the close relatives including even the father's father or the father's mother, not to speak of others. In the failure of both the parents, the father's father, and in his failure, in the absence of his executor or that of the father, the right of custody shall belong to the close relatives of the child in order of their right of

و جهان لا يترك الاحتياط بالتصالح و التسالم.

مسألة ١٨ ـ تنتهي الحضانة ببلوغ الولد رشيداً، فاذا بلغ رشيداً ليس لأحد حق الحضانة عليه حتى الأبوين، بل هو مالك لنفسه ذكراً كان أو أنثى.

فصل في النفقات

إنما تجب النفقة بأحد أسباب ثلاثة: الزوجية والقرابة والملك.

مسألة ١ ـ إنما تجب نفقة الزوجة على الزوج بشرط أن تكون دائمة فلا نفقة للمنقطعة، و أن تكون مطيعة له فيما يجب إطاعتها له، فلا نفقة للناشزة، و لا فرق بين المسلمة و الذمية.

مسألة ٢ ـ لو نشزت ثم عادت إلى الطاعة لم تستحق النفقة حتى تظهرها و علم بها و انقضى زمان أمكن الوصول إليها.

مسألة ٣ ـ لو ارتدت سقطت النفقة، و إن عادت في العدة عادت.

مسألة ٤ ـ الظاهر أنه لا نفقة للزوجة الصغيرة غير القابلة للاستمتاع منها على زوجها، خصوصاً إذا كان صغيراً غير قابل للتمتع و التلذذ، و كذا للزوجة الكبيرة إذا كان زوجها صغيراً غير قابل لأن يستمتع منها، نعم لو كانت الزوجة مراهقة و الزوج مراهقاً أو كبيراً أو كان الزوج مراهقاً والزوجة كبيرة لم يبعد استحقاقها لها مع تمكينها له من نفسها على ما يمكنه من التلذذ و الاستمتاع منها.

مسألة ٥ ـ لا تسقط نفقتها بعدم تمكينه من نفسها لعذر شرعي أو عقلي من حيض أو إحرام أو اعتكاف واجب أو مرض أو غير ذلك، و كذا لا تسقط إذا سافرت باذن الزوج سواء كان في واجب أو مندوب أو مباح و كذا لو سافرت في واجب مضيق كالحج الواجب بغير إذنه، بل ولو مع منعه و نهيه، بخلاف ما لو سافرت بغير إذنه في مندوب أو مباح، فانه تسقط نفقتها، بل الأمر كذلك لو

inheritance, the closer depriving the remoter, and in case of several of them having equal right and dispute among them, the matter shall be decide by casting lots.

If there is an executor appointed by the father or grandfather, whether the matter of the child's custody shall remain as it is, or it shall first go to the executor and then to the near relatives, there are two alternatives, but caution must not be given up by reaching a compromise.

Problem # 18. The right of custody is terminated on the child's attaining maturity. When the child attains maturity, no one shall have the right of his/her custody, even his parents, and he/she has full authority over himself / herself, irrespective of the child being male or female.

Chapter Twelve - Laws relating to Maintenance (*Nafaqah*)

Maintenance becomes an obligatory liability due to three factors: a marital relation, affinity or right of ownership.

[I – Maintenance of the Wife by her Husband]

Problem # 1. Maintenance of the wife is the mandatory liability of the husband, provided she is a permanent wife, as a temporary wife is not entitled to maintenance, and that she must be obedient to the husband in case it is obligatory upon her to be obedient to him, so that a contumacious wife is not entitled to maintenance, there being no difference between a Muslim or *Dhimmī* wife.

Problem # 2. If a wife turns disobedient, and then returns to obedience, she shall not be entitled to maintenance again until she expresses her obedience and the husband comes to realise it, and a certain period passes till it becomes possible for him to reach her.

Problem # 3. If a woman becomes an apostate, her right to maintenance shall be forfeited. But if she returns [to the faith] during the currency of the '*Iddah*, her right shall also be restored.

Problem # 4. Apparently a minor wife is not entitled to maintenance if she is not capable of being enjoyed by the husband, particularly when she is a minor who is incapable of enjoyment and pleasure. The same is the rule if the wife is an adult, but the husband a minor who cannot enjoy her. If, however, the wife is adolescent, and the husband an adolescent or an adult, or the husband is adolescent and the wife an adult, it is not far from her being entitled to maintenance due to her readiness to surrender herself to the husband to have the possible enjoyment and pleasure from her.

Problem # 5. The wife's right to maintenance is not forfeited due to his lack of enjoyment from her due to some legal or reasonable excuse like menstruation, tying of *Iḥrām*, obligatory religious seclusion (*I'tikāf*), sickness , etc. So also it shall not be forfeited if she travels with the permission of her husband, irrespective of the journey being obligatory, approved or preferable. The same shall be the rule if she

خرجت من بيته بغير إذنه ولو لغير سفر فضلاً عما كان له، لتحقق النشوز المسقط لها.

مسألة ٦ ـ تثبت النفقة و السكنى لذات العدة الرجعية مادامت في العدة كما تثبت للزوجة من غير فرق بين كونها حائلاً أو حاملاً، ولو كانت ناشزة و طلقت في حال نشوزها لم تثبت لها كالزوجة الناشزة، و إن رجعت إلى التمكين وجبت النفقة على الأقرب، و أما ذات العدة البائنة فتسقط نفقتها و سكناها، سواء كانت عن طلاق أو فسخ إلا إذا كانت عن طلاق و كانت حاملاً، فانها تستحقها حتى تضع حملها، و لا تلحق بها المنقطعة الحامل الموهوبة أو المنقضية مدتها، و كذا الحامل المتوفى عنها زوجها، فانه لا نفقة لها مدة حملها، لا من تركة زوجها و لا من نصيب ولدها على الأقوى.

مسألة ٧ ـ لو ادعت المطلقة بائناً أنها حامل مستندة إلى وجود الأمارات التي يستدل بها على الحمل عند النسوان فتصديقها بمجرد دعواها محل إشكال، نعم لا يبعد قبول قول الثقة الخبيرة من القوابل قبل ظهور الحمل من غير احتياج إلى شهادة أربع منهن أو إثنين من الرجال المحارم، فحينئذ أنفق عليها يوماً فيوماً إلى أن يتبين الحال، فان تبيّن الحمل و إلا استعيدت منها ما صرف عليها، و في جواز مطالبتها بكفيل قبل تبين الحال و جهان بل قولان، أرجحهما الثاني إن قلنا بوجوب تصديقها، و كذلك مع علمه و إخبار الثقة من أهل الخبرة.

مسألة ٨ ـ لا تقدير للنفقة شرعاً، بل الضابط القيام بما تحتاج إليه المرأة من طعام و إدام و كسوة و فراش و غطاء و إسكان و إخدام و آلات تحتاج إليها لشربها و طبخها و تنظيفها و غير ذلك.

فأما الطعام فكميته بمقدار ما يكفيها لشبعها، و في جنسه يرجع إلى ما هو المتعارف لأمثالها في بلدها و الموالم لمزاجها و ما تعودت به بحيث تتضرر بتركه.

و أما الادام فقدراً و جنساً كالطعام يراعى ما هو المتعارف لأمثالها في بلدها و ما يوالم مزاجها و ما هو معتاد لها حتى لو كانت عادة أمثالها أو الموالم لمزاجها

goes on an obligatory journey as for Ḥajj without his permission, even despite his prevention and forbiddance, contrary to the case when she goes on an obligatory or approved journey without his permission, in which case her right to maintenance is forfeited. Rather the same shall be the rule if she leaves his house without his permission, even without the intention of a journey, not to speak if it were with that intention, due to the commission of disobedience causing forfeiture of right to maintenance.

Problem # 6. The right to maintenance and residence is established for a woman observing *'Iddah* for a revocable divorce as long as it is in currency, as it is established for a wife, irrespective of her being pregnant or otherwise. If she were contumacious, and is divorced during her contumacy, it is not established like a contumacious wife. If, however, she return to surrender herself , her maintenance shall become obligatory, according to the opinion closer to the traditional authority.

However, a woman observing an irrevocable *'Iddah* forfeits the right to maintenance and residence, irrespective of its being for a divorce or dissolution of marriage, except when it is for a divorce and she is pregnant, in which case she is entitled to maintenance until the delivery of the child. To this is not affiliated the case of a pregnant temporary wife whose period has been excused by the husband or whose period has expired. The same is the case of a wife whose husband is dead, who is not entitled to maintenance during her pregnancy, from the inheritance of her husband or the share of her child out it, according to the stronger opinion.

Problem # 7. If an irrevocably divorced woman claims to be pregnant on the authority of the existence of the symptoms that lead to pregnancy among women, there shall be hesitation in confirmation on her mere claim.

Of course, it is not far from accepting the word of reliable women from among the midwives before the appearance of pregnancy without the need of evidence of four of them or two men from among her *Maḥram* persons, in which case maintenance on her shall be made day to day until her position becomes clear. If pregnancy is apparent, [well and good]; otherwise, she shall be required to return whatever has been spent on her. On the justification of demand for a guarantor from her before the clearance of her position. there are two alternatives, or opinions, the preferable one being in favour of he latter if our opinion is in favour of her confirmation. The same is the case of its absence and the reliable information by experts.

Problem # 8. Legally no amount is specified for maintenance, but the rule is the provision of what is needed by the woman from food, condiments, clothes, beddings, quilts, residence, servants and the utensils used for drinking, cooking, toilet, etc.

As regards food, its quantity is as much as is sufficient to make her fill. For its quality reference

دوام اللحم مثلاً وجب، و كذا لو اعتادت بشيء خاص من الادام بحيث تتضرر بتركه، بل الظاهر مراعاة ما تعارف اعتياده لأمثالها من غير الطعام و الادام كالشاي و التنباك و القهوة و نحوها، وأولى بذلك المقدار اللازم من الفواكه الصيفية التي تناولها كاللازم في الأهوية الحارة، بل و كذا ما تعارف من الفواكه المختلفة في الفصول لمثلها.

و كذلك الحال في الكسوة، فيلاحظ في قدرها و جنسها عادة أمثالها و بلد سكناها و الفصول التي تحتاج إليها شتاءً وصيفاً، ضرورة شدة الاختلاف في الكم و الكيف و الجنس بالنسبة إلى ذلك ، بل لو كانت من ذوات التجمل وجب لها زيادة على ثياب البدن ثياب على حسب أمثالها.

و هكذا الفراش و الغطاء، فان لها ما يفرشها على الأرض و ما تحتاج إليها للنوم من لحاف و مخدة و ما تنام عليها، و يرجع في قدرها و جنسها و وصفها إلى ما ذكر في غيرها، و تستحق في الاسكان أن يسكنها داراً تليق بها بحسب عادة أمثالها، و كانت لها من المرافق ما تحتاج إليها، و لها أن تطالبه بالتفرد بالمسكن عن مشاركة غير الزوج ضرة أو غيرها من دار أو حجرة منفردة المرافق، إما بعارية أو إجارة أو ملك ، ولو كانت من أهل البادية كفاها كوخ أو بيت شعر منفرد يناسب حالها.

و أما الاخدام فانما يجب إن كانت ذات حشمة و شأن و من ذوي الأخدام، و إلا خدمت نفسها، و إذا وجبت الخدمة فان كانت من ذوات الحشمة بحيث يتعارف من مثلها أن يكون لها خادم مخصوص لابد من اختصاصها به، ولو بلغت حشمتها بحيث يتعارف من مثلها تعدد الخادم فلا يبعد وجوبه.

و الأولى إيكال الأمر إلى العرف و العادة في جميع المذكورات، و كذا في الآلات و الأدوات المحتاج إليها، فهي أيضاً تلاحظ ما هو المتعارف لأمثالها بحسب حاجات بلدها التي تسكن فيها.

must be made to the food usually supplied to her equals in her town suitable for her eating habits or what she is habituated to take so that giving it up may be harmful for her.

As regards the condiments, the amount and quality must be like the food usually used by her equals in her town and as is suitable for her habits, or if what is usual for her including what is usual among her equals or suitable for her habit, suppose, the continuance of meat is necessary, it shall be obligatory. The same is the case with anything special out of condiments to which she is used and giving it up shall be harmful for her.

Apparently consideration must be made for he equals are usually habituated to take besides food and condiments, like tea, tobacco, coffee, or the like.

Even more important is the necessary amount of seasonal fruits that are necessarily eaten in warm climates.

Likewise, there are other usual, different types of fruits in other seasons for her equals.

The same is the case with clothes, in whose quantity and quality consideration is to be made for what is usual among her equals, town of residence and the seasons that are required in winter and summer, as there is extreme difference of opinion as regards the quantity, quality and kind in their respect.

If she were from among those who are used to embellishments, it is obligatory to supply to her clothes according to her equal besides the clothes on her body.

The same is the case with the carpets and covers, as she must have the carpets to be laid on the floor, and what is required at bed time like quilts, pillows and the beds on which to sleep. For their quantity, quality and kind, consideration is to be made as mentioned in case of other objects.

For residence, the wife is entitled to a house suitable for her as usual for her equal. She should be supplied the facilities required by her. She can demand for her residence a separate house without sharing a co-wife, etc. or a furnished independent room, by *Āriyah*, lease or ownership.

If the woman belongs to the Beduins, a cottage or a tent suitable for her position shall be sufficient for her.

As regards the servants, she is to be provided servants if she happens to belong to high ranking and noble family having servants, or the husband must provide personal service for her.

If she happens to belong to a family where her equals usually have private servants, she has to be provided a servant especially for her. If she comes of a high ranking family having several servants, it is not far from being obligatory to provide several servants.

It is better to keep in view the prevalent customs and usages in all the matters mentioned above.

The same relates to the utensils and equipments required by her.

She must also take into consideration what is usual among her equals according to the requirements of her town in which she resides.

مسألة ٩ ـ الظاهر أنه من الانفاق الذي تستحقه الزوجة أجرة الحمام عند الحاجة، سواء كان للاغتسال أوللتنظيف إذا كان بلدها مما لم يتعارف فيه الغسل و الاغتسال في البيت أو يتعذر أو يتعسر ذلك لها لبرد أو غيره، و منه أيضاً الفحم و الحطب و نحوهما في زمان الاحتياج إليها، و كذا الأدو ية المتعارفة التي يكثر الاحتياج إليها بسبب الأمراض و الآلام التي قلّما يخلو الشخص منها في الشهور و الأعوام، نعم الظاهر أنه ليس منه الدواء و ما يصرف في المعالجات الصعبة التي يكون الاحتياج إليها من باب الا تفاق خصوصاً إذا احتاج إلى بذل مال خطير، و هل يكون منه أجرة الفصد و الحجامة عند الاحتياج إليهما؟ فيه تأمل و إشكال.

مسألة ١٠ ـ تملك الزوجة على الزوج نفقة كل يوم من الطعام و الادام وغيرهما مما يصرف و لا يبق عينه في صبيحته ملكاً متزلزلاً مراعى بحصول تمام التمكين منها، و إلا فبمقداره و تسترد البقية، فلها أن تطالبه بها عنده، فلو منعها مع التمكين و انقضى اليوم استقرت في ذمته و صارت ديناً عليه، و كذا يشترط ذلك في الاستقرار مع انقضاء أيام، فيستقر بمقدار التمكين على ذمته نفقة تلك المدة، سواء طالبته بها أو سكتت عنها،وسواء قدّرها الحاكم حكم بها أم لا، و سواء كان موسراً أو معسراً، و مع الاعسار ينظر إلى اليسار، و ليس لها مطالبة نفقة الأيام الآتية.

مسألة ١١ ـ لو دفعت إليها نفقة أيام كأسبوع أو شهر مثلاً و انقضت المدة و لم تصرفها على نفسها ـ إما بأن أنفقت من غيرها أو أنفق إليها شخص ـ كانت ملكاً لها. و ليس للزوج استردادها، و كذا لو استفضلت منها شيئاً بالتقتير على نفسها كانت الزيادة ملكاً لها، فليس له استردادها، نعم لو خرجت عن الاستحقاق قبل انقضاء المدة بموت أحدهما أو نشوزها أو طلاقها بائناً يوزع المدفوع على الأيام الماضية و الآتية و يسترد منها بالنسبة الى ما بقي من المدة، بل الظاهر ذلك أيضاً فيا إذا دفع لها نفقة يوم و عرض أحد تلك العوارض في أثنائه، فيسترد الباقي من

Problem # 9. Apparently maintenance to which a wife is entitled includes the charges for public bath when needed, irrespective of its being for taking a bath or cleaning if her town is such that the arrangement for taking bath or washing is not customary in the house , or it is not possible to do so due to cold ,etc.. To this are also included coal and fuel or the like during the period they are needed. Likewise there are the usual medicines mostly needed due to diseases and pains as there are few people who are free from them in any months and years. Of course, apparently it does not include medicine and the expenditure on difficult treatments required by chance particularly they require spending large amounts of money. Does it include the charges for phlebotomy and cupping when needed; there is hesitation and difficulty in accepting it.

Problem # 10. The maintenance on food and condiments, etc., spent every day of which nothing is left the next morning belongs to the wife as her property, but its ownership wavers due to the consideration of fulfilment of complete surrender on her part. Otherwise, it shall be limited to the amount of her surrender, and the rest shall have to be returned to the husband. In case of her complete surrender, she shall be entitled to demand it from the husband. If the husband fails to provide it despite her complete surrender, and the day passes, it shall be established against the husband and as a debt against him.

Likewise, complete surrender is a condition for the establishment of maintenance with the passage of time. So the maintenance is established against the husband for the period in proportion to the amount of her surrender, irrespective of whether she has demanded it or has kept quiet, and whether its amount has been determined according to the order of the judge or not, and whether the husband is well-to-do or indigent. In case of the husband's indigence, she shall have to wait until his easy circumstances. She is not entitled to demand the maintenance for the future days.

Problem # 11. If maintenance for a certain period, suppose, for a week or a month has been paid to her, and even after the expiry of the period she does not spend it on herself, either due to her spending from some other fund or another person spending on her, it shall belong to her, and the husband shall not be entitled to demand it back from her.

Likewise, if something is left out of it due to her spending economically, the excess shall also belong to her as her property, and the husband shall not have the right to demand it back.

Of course, if she is deprives of the right before the expiry of the period due to the death of either of them, her contumacy or irrevocable divorce the amount paid to her shall be divided between the past and future days and shall be returned in proportion to what is left out of the period.

Rather apparently the same shall be the rule in case she was paid the maintenance of a day and any of the said deficiencies have occurred during the day, so that whatever is left out of the

نفقة اليوم.

مسألة ١٢ ـ كيفية الانفاق بالطعام و الادام إما بمواكلتها مع الزوج في بيته على العادة كسائر عياله، و إما بتسليم النفقة لها، و ليس له إلزامها بالنحو الأول، فلها أن تمتنع من المؤاكلة معه و تطالبه بكون نفقتها بيدها تفعل بها ما تشاء، إلا أنه إذا أكلت و شربت معه على العادة سقط ما عليه و ليس لها أن تطالبه بعده.

مسألة ١٣ ـ ما يدفع إليها للطعام و الادام إما عين المأكول كالخبز و التمر والطبيخ و اللحم المطبوخ مما لا يحتاج في إعداده للأكل إلى علاج و مزاولة و مؤونة و كلفة و إما عين تحتاج إلى ذلك كالحب و الأرز والدقيق و نحوها، فان لم يكن النحوان خلاف المتعارف فالزوج بالخيار بينهما. و ليس للزوجة الامتناع، ولو اختار النحو الثاني و احتاج إعداد المدفوع للأكل إلى مؤونة كالحطب و غيره كان عليه، و إن كان أحدهما خلاف المتعارف يتبع ما هو المتعارف.

مسألة ١٤ ـ لو تراضيا على بذل الثمن و قيمة الطعام و الادام و تسلمت ملكته و سقط ما هو الواجب عليه، و ليس لكل منهما إلزام الآخر به.

مسألة ١٥ ـ انما تستحق في الكسوة أن يكسوها بما هو ملكه أو بما استأجره أو استعاره، ولا تستحق عليه أن يدفع إليها بعنوان التمليك ، ولو دفع إليها كسوة لمدة جرت العادة ببقائها إليها فكستها فخلقت قبل تلك المدة أو سرقت وجب عليه دفع كسوة أخرى إليها، ولو انقضت المدة و الكسوة باقية على نحو يليق بحالها ليس لها مطالبة كسوة أخرى، ولو خرجت في أثناء المدة عن الاستحقاق لموت أو نشوز أو طلاق تسترد إذا كانت باقية، و كذا الحال في الفراش و الغطاء و اللحاف و الآلات التي دفعها إليها من جهة الانفاق مما تنتفع بها مع بقاء عينها، فانها كلها باقية على ملك الزوج تنتفع بها الزوجة، فله استردادها إذا زال استحقاقها إلا مع التمليك لها.

مسألة ١٦ ـ لو اختلف الزوجان في الانفاق و عدمه مع اتفاقهما على

maintenance of the day shall have to be returned.

Problem # 12. The procedure of the maintenance of the food and condiments of the wife is that either paid by her eating and drinking with the husband in his house as usual like other members of his family or it is to be delivered to her. She is not bound to accept the first manner, and has the right to refuse to eat and drink with the husband and demand the payment of her maintenance to her so that she could do with it as she liked, except that once she has eaten and drunk with the husband as usual, she shall have no right to demand it separately later.

Problem # 13. What is paid to her for food and condiments is either in the form of cooked food like bread, dates, cooked food, cooked meat that is not required to be prepared by herself for eating by spending labour, pain, material and trouble , or something that require all such paid and trouble like cereals, rice, flour, or the like.

If both the types are not against the normal practice, the husband shall have the right to opt either of them, and the wife shall not have the right to object. If he chooses the second manner, and it requires some material like fuel, etc., for the preparation of the food out of the foodstuff, the husband shall have to supply it. If either of them is against the usual practice, the manner that is usual shall be followed.

Problem # 14. If both the husband and wife agree on the payment of the cost and price of the food and condiments, and it is paid to her, it shall be her property, and he shall be absolved of his liability, and neither of them shall be entitled to compel the other to adopt it.

Problem # 15. The wife shall be entitled to be provided clothes either out of his own property or taking on hire or by way of *'Āriyah*, and she is not entitled to demand it to become her property.

If the husband supplies clothes to her for the period for which it usually lasts, and after she wears it, it becomes worn out before that period, or is stolen, the husband shall be bound to provide other clothes to her.

If the period has expired and the clothes are intact in a way that they are still suitable for her, she shall not have the right to demand another clothes. If she is deprived of the right during period due to death, contumacy or divorce, she shall return them if they are still intact.

The same is the case with the carpets, curtains, quilt, equipments supplied to her as part of the maintenance to be utilised by her provided they are still intact, so all these things shall remain a property of the husband while they can be used by the wife. The husband shall be entitled to demand them back when she has lost the right, except when they have been allowed to become her property.

Problem # 16. If the wife and husband have a dispute over [the payment of] maintenance or its

الاستحقاق فان كان الزوج غائباً أو كانت الزوجة منعزلة عنه فالقول قولها بيمينها، و عليه البيّنة، و ان كان في بيته داخلة في عيالاته فالظاهر أن القول قول الزوج بيمينه و عليها البينة.

مسألة ١٧ ـ لو كانت الزوجة حاملاً و وضعت و قد طلقت رجعياً و اختلفا في زمان وقوع الطلاق فادعى الزوج أنه قبل الوضع و قد انقضت عدتها به فلا نفقة لها، و ادعت أنه بعده و لم تكن بينة فالقول قولها مع اليمين، فان حلفت ثبت لها استحقاق النفقة، لكن يحكم عليه بالبينونة و عدم جواز الرجوع أخذاً باقراره.

مسألة ١٨ ـ لو طالبته بالانفاق و ادعى الاعسار و عدم الاقتدار و لم تصدقه و ادعت عليه اليسار فالقول قوله بيمينه ان لم يكن لها بينة، إلا إذا كان مسبوقاً باليسار و ادعى تلف أمواله وصيرورته معسراً و أنكرته، فان القول قولها بيمين و عليه البينة.

مسألة ١٩ ـ لا يشترط في استحقاق الزوجة النفقة فقرها و احتياجها، فلها عليه الانفاق و ان كان من أغنى الناس.

مسألة ٢٠ ـ إن لم يكن له مال يفي بنفقة نفسه و زوجته و أقاربه الواجبي النفقه فهو مقدم على زوجته، و هي على أقاربه، فما فضل من قوته صرفه عليها، و لا يدفع إلى الأقارب إلا ما يفضل عن نفقتها.

القول في نفقة الأقارب

مسألة ١ ـ يجب على التفصيل الآتي الانفاق على الأبوين و آبائهما و أمهاتهما و إن علوا، و على الأولاد و أولادهم و إن نزلوا، ذكوراً و إناثاً صغيراً أو كبيراً مسلماً أو كافراً، و لا يجب على غير العمودين من الأقارب و إن استحب خصوصاً الوارث منه.

absence, despite their agreement on her right, then if the husband is away and the wife had been left alone by him, the word of the wife shall carry provided that it is followed by her oath, while the husband shall be required to adduce legal evidence.

If the wife were residing in the husband's house along with his family, then apparently the word of the husband shall be entertained provided that it is followed by his oath, while she shall be required to adduce legal evidence.

Problem # 17. If the wife were pregnant, and delivers a child, and is divorced revocably, and the spouses have dispute over the time the divorce is given, so that the husband claims that it was given before the delivery and so her *'Iddah* has thereby expired and so she is not entitled to maintenance, while the wife claims that the divorce was given after the delivery, but there is no evidence.

So the word of the wife shall carry provided it is followed by her oath. If she takes oath, her right to maintenance shall be established, but judgement shall be given in favour of their separation without any permission for recall concluded from his own admission.

Problem # 18. If the wife demands maintenance, and the husband claims indigence and inability, but she does not confirm it and claims his affluence, then the words of the husband shall be entertained if followed by his oath, if she has no evidence [in favour of her claim], except when he was previously affluent and claims destruction of his property and his consequent indigence, but she denies it, then her word shall carry provided it is followed by her oath, and the husband shall be required to adduce evidence [in favour of his claim].

Problem # 19. It is not a condition for the wife's entitlement for maintenance that she must be poor and needy. She is entitled to maintenance even if she were among the richest people.

Problem # 20. If the husband has no property sufficient for his own maintenance, that of the wife and his close relatives whose maintenance is obligatory upon him, then he is to be preferred to the wife and wife to his close relatives.

So what is left after spending on his own food shall be spent on the wife, and shall not be paid to the close relatives except what is left after spending on her maintenance.

II - Maintenance of Close Relatives

Problem # 1. According to the details that follow, it is obligatory [upon a man] to maintain both of his parents, their fathers and mothers, how high so ever, and children and their children, how low so ever, male or female, minor or adult, Muslims or infidels. It is not obligatory to maintain except the two vertically related from among the close relatives, though it is approved particularly those who are entitled to inherit from him.

مسألة ٢ ـ يشترط في وجوب الانفاق على القريب فقره و احتياجه بمعنى عدم وجدانه لما يقوت به فعلاً، فلا يجب إنفاق من قدر على نفقته فعلاً و إن كان فقيراً لا يملك قوت سنته و جاز له أخذ الزكاة و نحوها، و أما غير الواجد لها فعلاً القادر على تحصيلها فإن كان ذلك بغير الاكتساب كالاقتراض و الاستعطاء و السؤال لم يمنع ذلك عن وجوب الانفاق عليه بلا إشكال، و إن كان ذلك بالاكتساب فان كان ذلك بالاقتدار على تعلم صنعة بها إمرار معاشه و قد ترك التعلم و بقي بلا نفقة فلا إشكال في وجوب الانفاق عليه، وكذا الحال لو أمكن له التكسب بما يشق عليه تحمله كحمل الأثقال أولا يناسب شأنه فترك التكسب بذلك، فانه يجب عليه الانفاق عليه، و إن كان قادراً على التكسب بما يناسب حاله و شأنه وتركه طلباً للراحة فالظاهر عدم وجوبه عليه، نعم لو فات عنه زمان الاكتساب بحيث صار فعلاً محتاجاً بالنسبة إلى يوم أو أيام غير قادر على تحصيل نفقتها وجب و إن كان العجز حصل باختياره، كما أنه لو ترك التشاغل به لا لطلب الراحة بل لاشتغاله بأمر دنيوي أو ديني مهم كطلب العلم الواجب لم يسقط بذلك وجوبه.

مسألة ٣ ـ لو أمكن للمرأة التزويج بمن يليق بها و يقوم بنفقتها دائماً أو منقطعاً فهل تكون بحكم القادر فلا يجب الانفاق عليها أم لا؟ و جهان، أوجههما الثاني.

مسألة ٤ ـ يشترط في وجوب النفقة على القريب قدرة المنفق على نفقته بعد نفقة نفسه و نفقة زوجته لو كانت له زوجة دائمة، فلو حصل عنده قدر كفاية نفسه خاصة اقتصر على نفسه، ولو فضل منه شيء و كانت له زوجة فلزوجته، ولو فضل شيء فللأبوين و الأولاد.

مسألة ٥ ـ المراد بنفقة نفسه المقدمة على نفقة زوجته مقدار قوت يومه وليلته و كسوته اللائقة بحاله و كل ما اضطر إليه من الآلات للطعام و الشراب و الفراش و الغطاء و غيرها، فان زاد على ذلك شيء صرفه على زوجته ثم على قرابته.

Problem # 2. It is a condition for the obligation of maintenance of a close relative that he/she must be poor and needy in the sense that presently he/she has no means of livelihood. So one is not obliged to maintain those who presently have means to support themselves, even if he/she were poor and has no means of livelihood to support him/her for a year and is allowed to receive Zakāt or the like. If a person has presently no means of livelihood, but is able to arrange it, then if it were by means other than earning livelihood like borrowing, accepting voluntary gift or help from others or asking for alms or help, then he/she shall be entitled to maintenance without any hesitation.

If it were by earning livelihood, so that it were by his capability to learn some trade or profession for earning thereby his livelihood , but he has left learning it and is left without means of livelihood, then too there shall be no objection in his entitlement to maintenance. The same shall be the case if he is able to earn his livelihood through labour that is unbearable for him as carrying loads, or it s not suitable for his position and so he has left earning his livelihood by it, even then it shall be obligatory to maintain him.

If a person is able to earn his living by some work suitable for his position and honour, but he has left it for the sake of easy going, then apparently it shall not be obligatory to support him.

If, however, the time of his earning livelihood has passed in a way that he has presently become needy since one or more days without the capability to earn his livelihood, it shall be obligatory to maintain him even if the incapability has been of his own accord, as when he has left the work not for the sake of easy going, but for being engaged in some worldly or religious mission as necessary studies, the obligation shall not thereby be forfeited.

Problem # 3. If a woman is able to get married permanently or temporarily to a man who is suitable for her and is able to maintain her, then shall such a woman be treated as one capable to earn her living, and so it is not obligatory to maintain her, or not, is a question, having two alternatives, the better being the second.

Problem # 4. It is a condition for the liability of maintenance of close relative that maintainer must be able to maintain him/her after spending on his own maintenance and that of his wife, if he has a permanent wife. If a person is able maintain himself, it shall be confined to his own maintenance. If, however, something is left after spending on his own maintenance, it shall be meant for his wife. If something is left after spending her maintenance, it shall go to his parents and children.

Problem # 5. By maintenance of oneself that is precedent to the wife's maintenance is meant his food for the day and night and clothing suitable for his position and all that is required by him from the utensils for food , drink, carpets and beddings, curtains and coverings, etc. If something is left after spending on them, he shall spend it on his wife and then on his close relatives.

مسألة ٦ ـ لو زاد على نفقته شيء و لم تكن عنده زوجة فان اضطر إلى التزويج بحيث يكون في تركه عسر و حرج شديد أو مظنة فساد ديني فله أن يصرفه في التزويج و إن لم يبق لقريبه شيء، و إن لم يكن كذلك فالأحوط صرفه في إنفاق القريب، بل لا يخلو وجوبه من قوة.

مسألة ٧ ـ لو لم يكن عنده ما ينفقه على نفسه وجب عليه التوسل إلى تحصيله بأيّ وسيلة مشروعة حتى الاستعطاء والسؤال فضلاً عن الاكتساب اللائق بحاله، ولو لم يكن عنده ما ينفقه على زوجته أو قريبه فلا ينبغي الاشكال في أنه يجب عليه تحصيله بالاكتساب اللائق بحاله و شأنه، و لا يجب عليه التوسل إلى تحصيله بمثل الاستيهاب و السؤال، نعم لا يبعد وجوب الاقتراض إذا أمكن من دون مشقة و كان له محل الايفاء فيما بعد، و كذا الشراء نسيئة بالشرطين المذكورين.

مسألة ٨ ـ لا تقدير في نفقة الأقارب، بل الواجب قدر الكفاية من الطعام و الادام و الكسوة و المسكن مع ملاحظة الحال و الشأن و الزمان و المكان حسب ما مر في نفقة الزوجة.

مسألة ٩ ـ لا يجب إعفاف من وجبت نفقته ولداً كان أو والداً بتزويج أو إعطاء مهر له و إن كان أحوط مع حاجته إلى النكاح و عدم قدرته عليه و على بذل الصداق خصوصاً في الأب.

مسألة ١٠ ـ يجب على الولد نفقة والده دون أولاده لأنهم إخوته، و دون زوجته، و يجب على الوالد نفقة ولده و أولاده دون زوجته.

مسألة ١١ ـ لا تقضى نفقة الأقارب و لا يتداركها لو فاتت في وقتها و زمانها ولو بتقصير من المنفق، و لا تستقر في ذمته بخلاف الزوجة كما مرّ، نعم لو لم ينفق عليه لغيبته أو امتنع عن إنفاقه مع يساره و رفع المنفق عليه أمره إلى الحاكم فأمره بالاستدانة عليه فاستدان عليه اشتغلت ذمته به، و وجب عليه قضاؤه.

مسألة ١٢ ـ لوجوب الانفاق ترتيب من جهة المنفق و من جهة المنفق عليه،

Problem # 6. If there is something in surplus out of a man's maintenance, but he has no wife, then if he in need of marrying a woman in a way giving it up shall mean extreme distress and difficulty and risk of religious depravity, he must spend it on his marriage, even if nothing is left for spending on his close relatives. If this is not the case, then it is more cautious to spend on maintaining close relatives. Rather its obligation is not devoid of force.

Problem # 7. If a man has not enough to maintain himself, he is bound to adopt whatever legal source including even accepting voluntary gift or hep from others or asking for alms, let alone earning trough means suitable for his position . If he has not enough to maintain his wife or close relatives, there should be no hesitation in declaring him bound to earn by means that are suitable to his position and honour, but he is not bound to adopt means like asking for free gifts or alms for earning it. Of course, it is not far from being obligatory to borrow if it can be obtained without much labour, and he has means to repay it. The same rule applies to buy something on credit on the two conditioned mentioned.

Problem # 8. There is no fixed quantum of maintenance of the close relatives. Rather what is obligatory is what is sufficient out of food, condiments, clothes and residence inconsideration of the position, status, time and place as mentioned under the maintenance of wife.

Problem # 9. It is not obligatory to make virtuous the person who is bound to be maintained, irrespective of his being the son or the father by arranging his marriage or payment of dower on his behalf, even if he is need of marriage and is not capable of it or payment of the dower, particularly in case of the father.

Problem # 10. A son is bound to maintain his father excluding his children as they are his brethren, and also excluding his wife, and so a father is obliged to maintain his son and his children excluding his wife.

Problem # 11. No payment is made for the past maintenance of the close relatives, nor is it compensated if its time and period have expired even if due to the failure of the maintainer. It is not established as a liability against him contrary to the case of a wife, as already mentioned.

Of course, if he has failed to maintain due to his absence or has abstained from maintenance despite his affluence, and the person abound to be maintained refers his case to the judge, and he orders him to accept it as indebted to him and he accepts to be indebted to him, he shall be liable to the debt and shall be bound to pay it as due.

Problem # 12. There is an order for the obligation of maintenance as regards the maintainer and the person obliged to be maintained. As regards the former, the maintenance of the child, male or female, is obligatory on the father, and in case of his failure or poverty, it is obligatory on the paternal grandfather.

أما من الجهة الأولى فتجب نفقة الولد ذكراً كان أو أنثى على أبيه، و مع عدمه أو فقره فعلى جده للأب، و مع عدمه أو إعساره فعلى جد الأب و هكذا متعالياً الأقرب فالأقرب، و مع عدمهم أوإعسارهم فعلى أم الولد، و مع عدمها أو إعسارها فعلى أبيها و أم أبيها و أبي أمها و أم أمّها و هكذا الأقرب فالأقرب، و مع التساوي في الدرجة يشتركون فيه بالسوية و إن اختلفوا في الذكورة و الأنوثة، و في حكم آباء الأم و أمهاتها أم الأب، و كل من تقرب إلى الأب بالأم كأبي أم الأب و أم أمه و أم أبيه و هكذا، فانه تجب عليهم نفقة الولد مع فقد آبائه و أمه مع مراعاة الأقرب فالأقرب إلى الولد، فاذا كان له أب و جدّ موسران فالنفقة على الأب، ولو كان له أب و أم فعلى الأب، ولو كان جد للأب مع أم فعلى الجد، و مع جدّ لأم و ام فعلى الأم و مع جد وجدة لأم تشاركا بالسوية، و مع جدة لأب وجد وجدة لأم تشاركوا ثلاثاً، هذا في الأصول أعني الآباء و الأمهات.

و أما الفروع أعني الأولاد فتجب نفقة الأب و الأم عند الاعسار على الولد مع اليسار ذكراً كان أم أنثى، و مع فقده أو إعساره فعلى ولد الولد أعني ابن ابن أو بنت، و بنت ابن أو بنت و هكذا الأقرب فالأقرب، و مع التعدد و التساوي في الدرجة يشتركون بالسوية، فلو كان له ابن أو بنت مع ابن ابن مثلاً فعلى الابن أو البنت، ولو كان له ابنان أو بنتان أو ابن و بنت اشتركا بالسوية، و إذا اجتمعت الأصول و الفروع يراعى الأقرب فالأقرب، و مع التساوي يتشاركون، فإذا كان له أب مع ابن أو بنت تشاركا بالسوية و إن كان له أب مع ابن ابن أو ابن بنت فعلى الأب، و إن كان ابن وجد لأب فعلى الابن، و إن كان ابن ابن مع جد لأب تشاركا بالسوية، و إن كانت له أم مع ابن ابن أو ابن بنت مثلاً فعلى الأم، و يشكل الأمر فيما إذا اجتمعت الأم مع الابن أو البنت، و الأحوط التراضي و التسالم على الاشتراك بالسوية.

و أما الجهة الثانية فاذا كان عنده زائداً على نفقته و نفقة زوجته ما يكفي

and in case of his failure or poverty, it is obligatory on the father's grandfather, and so on the closer to be liable before the remoter. In case of their failure or incapability, it shall be obligatory on the child's mother, and in case of her failure or poverty on her father and her father's mother, and her mother's mother, and so on, the closer being liable before the remoter. In case they stand in the same degree of relationship, they shall share the liability equally, irrespective of their being male or female. As regards the rule relating to the liability of the mother's fathers and mothers, the father's mother as well as every related to the father through the mother as the father of the father's mother and his mother's or father's mother, and so on, they are liable for the maintenance of the child in case of his father's and mother's failure considering the closer to the child liable before the remoter. So if the child's father and grandfather are both affluent, the liability for the child's maintenance shall be on the father. If he has both the father and mother, then too it shall be on the father. If there is the paternal grandfather conjoined with the mother, the liability shall be on the grandfather, and when the maternal grandfather is conjoined with the mother, it shall be on the mother, and in case the maternal grandfather and grandmother are conjoined they shall share the liability equally. If the paternal grandmother and the maternal grandfather and grandmother are conjoined they shall share with one another each paying one-third of the liability. This is the case with the principal relatives, i.e., the fathers and mothers.

As regards the secondary relatives, i.e., the children on whom it is obligatory to maintain the father and mother provided the parents are poor and the child affluent, irrespective of the child being male or female, and in case of the child's failure or poverty their maintenance shall be the liability of the child's child, i.e., the son's or daughter's son, or son's or daughter's daughter, and so on, the closer being liable before the remoter. In case of their being several and equal in degree of relationship, they shall share the liability equally. If there is a son or daughter conjoined with, suppose, son's son, the liability shall be on the son or daughter. If there are two sons or daughters or a son and a daughter they shall share equally.

If the principal and secondary relatives are conjoined, the closer shall be liable before the remoter, and in case of being equal in degree, they shall share the liability equally. If there is the father conjoined with the son or daughter, they shall share the liability equally. If, however, there is the father conjoined with the son's or daughter's son, the liability shall be borne by the father. If there is the son and the paternal grandfather, it shall be borne by the son, while if there is the son's son conjoined with the paternal grandfather, they shall share the liability equally. If there is the mother conjoined with, suppose, the son's or daughter's son, the liability shall fall on the mother.

The matter shall, however, become difficult in case the mother is conjoined with the son or daughter, in which case it is more cautious to mutually agree on compromise and share the liability equally.

As regards those who are obliged to be maintained, if a person has a surplus after the

لجميع أقاربه المحتاجين وجب عليه نفقة الجميع، و إذا لم يكف إلا لإنفاق بعضهم ينفق على الأقرب فالأقرب منهم، و إذا كان قريبان أو أزيد في مرتبة واحدة و لا يكفي ما عنده الجميع فالأقرب أنه يقسم بينهم بالسوية مع إمكانه و إمكان انتفاعهم به، و إلا فيقرع بينهم.

مسألة ١٣ ـ لو كان له ولدان و لم يقدر إلا على نفقة أحدهما و كان له أب موسر فان اختلفا في قدر النفقة و كان ما عنده يكفي لأحدهما بعينه كالأقل نفقة اختص به و كان الآخر على الجد، و إن اتفقا في مقدارها فان توافق مع الجد في أن يشتركا أو يختص كل بواحد فهو، و إلا رجعا إلى القرعة.

مسألة ١٤ ـ لو امتنع من وجبت عليه النفقة عنها أجبره الحاكم، و مع عدمه فعدول المؤمنين، و مع فقد هم ففساقهم، و إن لم يمكن إجباره فان كان له مال أمكن للمنفق عليه أن يقتص منه مقدارها جاز للزوجة ذلك دون غيرها إلا باذن الحاكم، فمعه جاز له الأخذ و إن لم يكن اقتصاصاً و إن لم يكن له مال كذلك أمر الحاكم بالاستدانة عليه، و مع تعذر الحاكم يشكل الأمر.

مسألة ١٥ ـ تجب نفقة المملوك حتى النحل و دود القزّ على مالكه، و لا تقدير لنفقة البهيمة مثلاً، بل الواجب القيام بما تحتاج إليه من أكل وسقي و مكان رحل و نحو ذلك ، و مالكها بالخيار بين علفها و بين تخليتها لترعى في خصب الأرض، فان اجتزأت بالرعي و إلا علّفها بمقدار كفايتها.

مسألة ١٦ ـ لو امتنع المالك من الانفاق على البهيمة ولو بتخليتها للرعي الكافي لها أجبر على بيعها أو الانفاق عليها أو ذبحها إن كانت مما يقصد اللحم بذبحها.

maintenance of himself and his wife that is sufficient for maintaining all the needy close relatives, he shall be bound to maintain all of them. If it is not sufficient except for some of them, he shall maintain the closer and then the remoter of them. If there are two or more close relatives of the same degree of relationship, and he has not enough to maintain all of them, then he shall maintain the closer of them and, if possible, shall distribute it equally among them, if all of them may benefit by it; otherwise, their selection shall be made by casting lots.

Problem # 13. If a man has two children, and he is not able but to maintain one of them, while he has an affluent father, then if they have different amounts of maintenance, so that he has an amount enough to maintain the child needing lesser amount for maintenance, the maintenance of that child only shall be his liability, while that of the other shall be borne by the grandfather. If they have the same amount, then if he agrees with the grandfather to share equally or each to pay for one of them, well and good; otherwise, they shall resort to casting lots.

Problem # 14. If the person who is liable to maintain refrains from it, the judge shall compel him, and in case of his failure, the just believers shall compel him, and in case of their failure the depraved ones shall compel him. If it is not possible to compel him, then if he has some property and the person liable to be maintained can take out the amount of his/her maintenance from it, the wife shall be allowed to do so to the exclusion of others who cannot do so except with the permission of the judge. With the permission of the judge, it shall be allowed to take it, even if it is not called retaliation (*Iqtiṣāṣ or Qiṣāṣ*). If he has not such property, the judge shall order the person accept the amount of maintenance as a debt against him. In case of failure of the judge, the matter shall be difficult [to decide].

Problem # 15. It is the liability of every person to maintain whatever is owned by him including even a bee or silkworm. There is no fixed amount of maintenance of, suppose, the quadruped animals. It is rather obligatory to supply whatever is needed by them for eating, drinking, and shelter, or the like. The owner is at liberty to choose between supplying them fodder and leaving them in the green pastures for grazing. If they are not satisfied by grazing in the pastures, he shall be required to supply them fodder that may suffice them.

Problem # 16. If the owner refrains from maintaining the quadruped animals or leaving them in the pastures enough to graze, he shall be forced to dispose them off or maintain them, or to slaughter them if they belong to the category of animals that are slaughtered for the sake of meat.

كتاب الطّلاق

وله شروط وأقسام ولواحق وأحكام:

القول في شروطه

مسألة ١ ـ يشترط في الزوج المطلق البلوغ على الأحوط و العقل، فلا يصح على الأحوط طلاق الصبي لا بالمباشرة ولا بالتوكيل و إن كان مميزاً و له عشر سنين، ولو طلق من بلغه فلا يترك الاحتياط، ولا طلاق المجنون مطبقاً أو أدوارياً حال جنونه، و يلحق به السكران و نحوه ممن زال عقله.

مسألة ٢ ـ لا يصح طلاق ولي الصبي عنه كأبيه وجده فضلا عن الوصي و الحاكم، نعم لو بلغ فاسد العقل أو طرأ عليه الجنون بعد البلوغ طلق عنه وليه مع مراعاة الغبطة والصلاح، فان لم يكن له أب وجد فالأمر إلى الحاكم، و إن كان أحدهما معه فالأحوط أن يكون الطلاق منه مع الحاكم و إن كان الأقوى نفوذ طلاقه بلاضم الحاكم إليه.

مسألة ٣ ـ يشترط في الزوج المطلق القصد والاختيار بمعنى عدم الاكراه والاجبار، فلا يصح طلاق غير القاصد كالنائم و الساهي والغالط و الهازل الذي

SECTION THIRTY-NINE

DIVORCE – (*ṬALĀQ*)

The Section on Divorce or *Ṭalāq* comprises the following Chapters: Its Conditions, Kinds, Appendages and Laws.

Chapter One - Conditions of Divorce (*Ṭalāq*)

Problem # 1. It is a condition in a divorcing husband that, according to the more cautious opinion, he must be an adult and sane. So, according to the more cautious opinion, a divorce by a minor child, whether given personally or through an agent, is not valid, even if he is discreet and has attained the age of ten years. If a child who has attained the age of ten years gives divorce, caution must not be given up.

Likewise, no divorce takes place if given by a permanently insane person or one suffering from periodical fits of insanity when given in a state of insanity. To this category is affiliated an intoxicated person or the like who has lost sense.

Problem # 2. A divorce given by the guardian of minor boy on his behalf is not valid, like the one given by his father or grandfather let alone the one given by an executor of a judge. Of course, a guardian may give divorce on behalf of an insane person if the minor has attained maturity in a state of insanity or he has suffered insanity after attaining puberty, having full regard to the ward's interest. If he has no father or grandfather, then the right of giving divorce shall devolve on the judge. If either of them exists, then, to be more cautious, the divorce shall be given by him conjoining the judge, although, according to the stronger opinion, his divorce without conjoining the judge shall be effective.

Problem # 3. It is also a condition in a divorcing husband that he must have intention and free will, in the sense that t re must be no coercion or compulsion. So no divorce is valid if given by a person other

لا يريد وقوع الطلاق جداً، بل يتكلم بلفظه هزلاً، و كذا لايصح طلاق المكره الذي قد ألزم على إيقاعه مع التوعيد و التهديد على تركه.

مسألة ٤ ـ الاكراه هو حمل الغير على إيجاد ما يكره إيجاده مع التوعيد على تركه بايقاع ما يضر بحاله عليه أو على من يجري مجرى نفسه كأبيه و ولده نفساً أو عرضاً أو مالاً بشرط أن يكون الحامل قادراً على إيقاع ما توعد به مع العلم أو الظن بايقاعه على تقدير عدم امتثاله، بل أو الخوف به و إن لم يكن مظنوناً، و يلحق به موضوعاً أو حكماً ما إذا أمره بايجاد ما يكرهه مع خوف المأمور من عقوبته والاضرار عليه لو خالفه و إن لم يقع منه توعيد و تهديد، ولا يلحق به ما لو أوقع الفعل مخافة إضرار الغير عليه بتركه من دون إلزام منه عليه، فلو تزوج بامرأة ثم رأى أنه لو بقيت على حباله لوقعت عليه وقيعة من بعض متعلقيها كأبيها وأخيها مثلاً فالتجأ إلى طلاقها فطلقها يصح طلاقها.

مسألة ٥ ـ لو قدر على دفع ضرر الآمر ببعض التفصيات مما ليس فيه ضرر عليه كالفرار والاستغاثة بالغير لم يتحقق الاكراه، فلو أوقع الطلاق مثلاً حينئذ وقع صحيحاً، نعم لو قدر على التورية و أوقعه من دون ذلك فالظاهر وقوعه مكرهاً عليه و باطلاً.

مسألة ٦ ـ لو أكرهه على طلاق إحدى زوجتيه فطلق إحداهما المعينة وقع مكرهاً عليه، ولو طلقهما معاً ففي وقوع طلاق إحداهما مكرهاً عليه فيعين بالقرعة أو صحة كليهما و جهان لايخلو أولهما من رجحان، ولو أكرهه على طلاق كلتيهما فطلق إحداهما فالظاهر أنه وقع مكرهاً عليه.

مسألة ٧ ـ لو أكرهه على أن يطلق ثلاث تطليقات بينهما رجعتان فطلقها واحدة أو إثنتين ففي وقوع ما أوقعه مكرهاً عليه إشكال إلا إذا قصد تحمل ما أوعده عليه في ترك البقية أو كان ذلك بقصد احتمال التخلص عن المكروه، و أنه لعل المكره اقتنع بما أوقعه و أغمض عما لم يوقعه.

مسألة ٨ ـ لو أوقع الطلاق عن إكراه ثم تعقبه الرضا لم يفد ذلك في صحته و

than having intention like one who is asleep, one labouring under an error or mistake or one divorcing jokingly, without serious intention to divorce, but uttering the formula of divorce jokingly.

Likewise, a divorce is not valid if given by a person under coercion who has been compelled to give it by a promise or threat against failure to do as commanded.

Problem # 4. Coercion is ordering another to do what he is reluctant to do by a threat of affliction or harm to him or one treated at par with himself like his father or child, to the person, his honour or property, provided the person compelling has the power to fulfil what he is threatening to do and the threatened person has knowledge or assumption that he would materialise his threat if he fails to comply with his command; rather even if he has such apprehension, without any assumption. To this category is affiliated as a subject or rule, if a person orders another to do what he is reluctant to do under the fear of punishment or injury in the event of his non-compliance, even no threat has been made by the man ordering him.

To this category is not affiliated the act of a person under the fear of harming another if he gives it up without there being compulsion on him. If a man marries a woman and later thinks that if the woman continues in his wedlock, he may confront some distress from some of her relatives like her father or brother. So he finds it safe to divorce and actually divorces her, the divorce shall be valid.

Problem # 5. If the man is capable of repelling the injury feared from the person commanding him to do something by some device that is not harmful for him like escape or asking the support of another, no coercion shall be deemed to have taken place. If, suppose, he divorces in such conditions, it shall be valid. Of course, if he is capable of doing it secretly, but he does it without secret, then apparently it shall be treated as a divorce given under coercion and so invalid.

Problem # 6. If a person compels another to divorce either of his wives, and he divorces a definite wife, it shall be construed to have been given under coercion. If he divorces both of them, then in being the divorce to one of them under coercion to be decided by casting lots, or the validity of both, there are two alternatives, the first of them not being devoid of preference. If a person compels another to divorce both his wives, but he divorces one of them, apparently it shall be considered to have been given under coercion.

Problem # 7. If a man is compelled to give three divorces with intervening two recalls, but he gives one or two. Then there shall be hesitation in treated as given under coercion, except when he intends to bear what he has been commanded by leaving the rest intending thereby likelihood of being released, so that probably the coercer may be content with the divorces he has given and ignore the rest.

Problem # 8. If a man divorces under coercion, but later agrees with it, it shall not be effective in its validity, and it shall not be like the contract.

ليس كالعقد.

مسألة ٩ ـ لا يعتبر في الطلاق اطلاع الزوجة عليه فضلا عن رضاها به.

مسألة ١٠ ـ يشترط في المطلقة أن تكون زوجة دائمة، فلا يقع الطلاق على المتمتع بها، و أن تكون طاهرة من الحيض و النفاس، فلا يصح طلاق الحائض و النفساء، و المراد بهما ذات الدمين فعلاً أو حكماً كالنقاء المتخلل في البين، ولو نقتا من الدمين و لم تغتسلا من الحدث صح طلاقهما، و أن لا تكون في طهر واقعها فيه زوجها.

مسألة ١١ ـ انما يشترط خلو المطلقة من الحيض في المدخول بها الحائل دون غير المدخول بها و دون الحامل بناء على مجامعة الحيض للحمل كما هو الأقوى، فيصح طلاقها في حال الحيض، و كذا يشترط ذلك فيما إذا كان الزوج حاضراً بمعنى كونهما في بلد واحد حين الطلاق، ولو كان غائباً يصح طلاقها و إن وقع في حال الحيض لكن إذا لم يعلم حالها من حيث الطهر و الحيض و تعذر أو تعسر عليه استعلامها، فلو علم أنها في حال الحيض ولو من جهة علمه بعادتها الوقتية على الأظهر أو تمكن من استعلامها و طلقها فتبين وقوعه في حال الحيض بطل.

مسألة ١٢ ـ لو غاب الزوج فان خرج حال حيضها لم يجز طلاقها إلا بعد مضي مدة قطع بانقطاع ذلك الحيض أو كانت ذات العادة و مضت عادتها، فإن طلقها بعد ذلك في زمان لم يعلم بكونها حائضاً في ذلك الزمان صح طلاقها و إن تبين وقوعه في حال الحيض، و إن خرج في حال الطهر الذي لم يواقعها فيه طلقها في أي زمان لم يعلم بكونها حائضاً وصح طلاقها و إن صادف الحيض، نعم لو طلقها في زمان علم بأن عادتها التحيض فيه بطل إن صادفه، ولو خرج في الطهر الذي واقعها فيه ينتظر مضي زمان انتقلت بمقتضى العادة من ذلك الطهر إلى طهر آخر، و يكفي تربص شهر و الأحوط أن لا ينقص عن ذلك، و الأولى تربص ثلاثة أشهر، هذا مع الجهل بعادتها، و إلا فيتبع العادة على الأقوى، ولو وقع الطلاق بعد التربص المذكور لم يضر مصادفة الحيض في الواقع، بل الظاهر

Problem # 9. Wife's knowledge is not a condition in divorce, let alone her consent.

Problem # 10. It is a condition that the divorced woman must be a permanent wife, as a divorce to a temporary wife does take place. She must also be clean of menstrual and puerperal blood, as divorce to a woman having menstrual or puerperal blood is not valid, by which is meant those having the two types of blood in fact or by law as in case of an intervening purity, or when they might have become clean of the blood but have not taken bath, their divorce shall be valid. She must not be in a period of purity in which her husband has had enjoyed her sexually.

Problem # 11. The condition for a divorcee that she must be free from courses relates to a wife who has been enjoyed and is not pregnant excluding a woman who has not been enjoyed or is pregnant if it is accepted that menses and pregnancy can co-exist, as it is a stronger possibility, and so in such case her divorce during menses shall be valid. Likewise, it is a condition that the husband must not be away in the sense that at the time of divorce he should be in the same town. If ,however, he is away the divorce shall be valid, even if it has been given during her menses , but when the husband does not know about the actual position of the wife as to being clean of courses or in menses, and is not able to get information about her. If, however, he knows that she is in menses, even if due to his knowledge about her apparent usual routine, or is able to get information about her, and divorces her, and later it transpires that it was given during her menses, the divorce shall be void.

Problem # 12. If the husband is away, and he has left her during menses, it shall not be lawful to divorce her, except after the lapse of a period after which it becomes certain that the courses would be over, and she was normal in having courses and her usual period of menses has also expired, then if he divorces her at the time when he does not know that she is in menses at that time, hr divorce shall be valid, even if later it transpires that she was in menses [when she was divorced]. If he has left her in a state of purity during which he has not copulated with her and divorces her at any time he does not know she would be in menses at that time, the divorce shall be valid, even if it coincided with her courses.

Of course, if he divorces her at a time when he knows she could be in courses, the divorce shall be void, if it has coincided with her menses. If he has left her during a period of purity in which he had copulated with her, he must wait till another period of purity according to her normal routine. It is sufficient to wait for one month, and to be more cautious it should not be less than that, though it is better to wait for three months.

This is the case when he is ignorant of her normal routine; otherwise, he may follow her normal routine, according to the stronger opinion.

If the divorce has been given after the lapse of the said waiting time, its coincidence with actual menses shall not have ay adverse effect. Rather, apparently its coincidence with the period of purity in which he had copulated with her shall not do any harm if he has divorced her, suppose, after a

أنه لا يضر مصادفته للطهر الذي واقعها فيه بأن طلقها بعد شهر مثلاً أو بعد مضي مدة علم بحسب عادتها خروجها عن الطهر الأول و الحيض الذي بعده ثم تبين الخلاف.

مسألة ١٣ ـ الحاضر الذي يتعذر أو يتعسر عليه معرفة حال المرأة من حيث الطهر و الحيض كالغائب، كما أن الغائب لو فرض إمكان علمه بحالها بسهولة بلا تعسر كالحاضر.

مسألة ١٤ ـ يجوز الطلاق في الطهر الذي واقعها فيه في اليائسة و الصغيرة و الحامل و المسترابة، و هي المرأة التي كانت في سن من تحيض ولا تحيض لخلقة أو عارض، لكن يشترط في الأخيرة مضي ثلاثة أشهر من زمان المواقعة، فلو طلقها قبلها لم يقع.

مسألة ١٥ ـ لا يشترط في تربص ثلاثة أشهر في المسترابة أن يكون اعتزاله لأجل أن يطلقها، فلو لم يتفق مواقعتها بسبب إلى مضيها ثم بدا له طلاقها صح في الحال.

مسألة ١٦ ـ لو واقعها في حال الحيض لم يصح طلاقها في الطهر الذي بعد تلك الحيضة، بل لابد من إيقاعه في طهر آخر بعد حيض آخر، فما هو الشرط كونها مستبرأة بحيضة بعد المواقعة لا وقوعه في طهر غير طهر المواقعة.

مسألة ١٧ ـ يشترط في صحة الطلاق تعين المطلقة بأن يقول: «فلانة طالق» أو يشير إليها بما يرفع الابهام والاجمال، فلو كانت له زوجة واحدة فقال: «زوجتي طالق» صح، بخلاف ما إذا كانت له زوجتان أو أكثر، وقال: «زوجتي طالق» إلا إذا نوى في نفسه معينة، فهل يقبل تفسيره بمعينة من غير بين؟ فيه تأمل.

القول في الصيغة

مسألة ١ ـ لا يقع الطلاق إلا بصيغة خاصة، و هي قوله: «أنت طالق» أو

month or after the lapse of time he knows she would normally have passed from the first period of purity to the subsequent courses, and later it transpires otherwise.

Problem # 13. A person who is not away but is unable to know about the position of the wife as to her being clean or in menses is like one who is away, as one who is away but is able to know easily about her position is like one who is not away.

Problem # 14. A wife may be divorced during a period of purity in which her husband has copulated with her if she is of past child-bearing age, minor, pregnant or *Mustarābah*, i.e., a woman who is within the age of women who have menses but has no menses, but in case of the latter lapse of three months since the sexual intercourse is a condition, so that if he divorces her before it, the divorce shall not be valid.

Problem # 15. In case of a *Mustrābah*, it is not a condition for waiting for three months that he should leave her for the sake of divorcing her. So if intercourse has not taken place due to any reason until the lapse of that period, and he intends to divorce her, he may divorce her immediately.

Problem # 16. If a husband has copulated with his wife during courses, his divorce during the following period of purity shall not be valid; rather, it is shall be indispensable to divorce her after the period of purity following the next courses.

The condition of her being clean of menses after intercourse is not that it should take place in a period of purity other than the period of purity of intercourse.

Problem # 17. It is a condition for the validity of the divorce that the divorcee must be specified, so the divorcing person may say: "Such a one is divorced", and should point towards her in order to avoid any confusion or doubt.

If he has a single wife, and he says: "My wife is divorced", it shall be valid, contrary to the case when he had two or more wives, and he says: "My wife is divorced", except when he intended at heart a specific wife, then as to the acceptance of his explanation regarding the specific wife without an oath, there is hesitation.

Chapter Two - *Ṣīghah*, or Specific Formula for Divorce

Problem # 1. A divorce does not take place except by an express formula (*Ṣīghah*), as the divorcing person uttering the words: "*anṭi ṭāliq*" (You are divorced", or such a one, or this one, or such other

فلانة أو هذه أو ما شاكلها من الألفاظ الدالة على تعيين المطلقة، فلا يقع بمثل «أنت مطلقة» أو «طلقت فلانة» بل ولا «أنت الطالق» فضلاً عن الكناية كأنت خلية أو برية أو «حبلك على غاربك» أو «الحق بأهلك» و نحو ذلك فلا يقع بها و إن نواه حتى قوله: «اعتدي» المنوي به الطلاق على الأقوى.

مسألة ٢ - يجوز إيقاع طلاق أكثر من زوجة واحدة بصيغة واحدة فلو قال: «زوجتاي طالقان» أو «زوجاتي طوالق» صح طلاق الجميع.

مسألة ٣ - لا يقع الطلاق بما يرادف الصيغة المزبورة من سائر اللغات مع القدرة. و مع العجز يصح. و كذا لا يقع بالاشارة ولا بالكتابة مع القدرة على النطق. و مع العجز يصح إيقاعه بهما. و الأحوط تقديم الكتابة لمن يعرفها على الاشارة.

مسألة ٤ - يجوز للزوج أن يوكل غيره في طلاق زوجته بالمباشرة أو بتوكيل غيره، سواء كان الزوج حاضراً أو غائباً، بل و كذا له أن يوكل زوجته فيه بنفسها أو بالتوكيل، لكن لا ينبغي ترك الاحتياط بعدم توكيلها.

مسألة ٥ - يجوز أن يوكّلها على أنه لو طال سفره أزيد من ثلاثة شهور مثلاً أو سامح في إنفاقها أزيد من شهر مثلاً طلقت نفسها، لكن بشرط أن يكون الشرط قيداً للموكل فيه لا تعليقاً في الوكالة.

مسألة ٦ - يشترط في صيغة الطلاق التنجيز، فلو علقه على شرط بطل سواء كان مما يحتمل وقوعه كما إذا قال: «أنت طالق إن جاء زيد» أو مما يتيقن حصوله، كما إذا قال: «إن طلعت الشمس» نعم لا يبعد جواز تعليقه على ما يكون معلقاً عليه في الواقع كقوله: «إن كانت فلانة زوجتي فهي طالق» سواء كان عالماً بأنها زوجته أم لا.

مسألة ٧ - لو كرر صيغة الطلاق ثلاثاً فقال: «هي طالق هي طالق هي طالق» من دون تخلل رجعة في البين قاصداً تعدده تقع واحدة و لغت الأخريان، ولو قال: «هي طالق ثلاثاً» لم يقع الثلاث قطعاً، والأقوى وقوع واحدة

words that lead to the determination of the divorcee. So it does not take place by saying "*anti muṭallaqah*", or "*ṭallaqtu fulānata*"; rather, even by "*anti al-ṭāliq,*" let alone by implied words, as : You are released, or free, or "Your reins are on your neck", or "Be take yourself to your people", or the like, as a divorce does not take place by using such words, even by his uttering : "Observe *'Iddah*," intending thereby divorce, according to the stronger opinion.

Problem # 2. It is lawful to divorce more than one wife by a single *Ṣīghah*, as by "Both of my wives are divorced", or "My wives are divorced," thereby divorce to all the wives shall be valid.

Problem # 3. A divorce is not made by expressing the above formula in other languages [than Arabic] in case the person is able to express it [in Arabic]. In case of inability to do so, it shall be valid [to express it in any other language].

Likewise, it is neither made by mere signs, nor by writing, when a person is able to express it in words. In case of inability, it may be expressed in either of two ways, the more cautious being in writing for a person who knows it rather than signs.

Problem # 4. It is permissible to appoint another as one's agent in divorcing one's wife in order to make it personally or through another agent, irrespective of the husband being present or absent.

Rather in like manner he may authorize his own wife to do it by herself or through an agent, though caution must not be given up by not appointing her his agent.

Problem # 5. It is permissible to authorize his wife to divorce herself in case, suppose, his journey lasts for more than three months or he fails to maintain her for more than one month, but on the condition that the condition may be contingent in what the authority is given but not in the agency itself.

Problem # 6. It is a condition that the formula of divorce should be free from condition, so that one makes it dependent on a condition, the divorce would be void irrespective of what has been condition is likely to happen, as when he says [to his wife]: "You are divorced, if Zayd comes,' or what is certain to happen, as when he says: "[You are divorced], if the sun rises." Of course, it is not far from being permissible to make something contingent that is by itself contingent, as when he says: "if such a one is my wife, she is divorced," irrespective of whether he had the knowledge about her being his wife or not.

Problem # 7. If a person repeats the formula of divorce three times, by saying: "She is divorced, she is divorced, she is divorced," without intervening recalls, intending thereby to make three divorces, only a single divorce shall take effect, and the two others shall be void.

كالصورة السابقة.

مسألة ٨ ـ لو كان الزوج من العامة ممن يعتقد وقوع الثلاث بثلاث مرسلة أو مكررة و أوقعه بأحد النحوين ألزم عليه سواء كانت المرأة شيعية أو مخالفة، و نرتب نحن عليها آثار المطلقة ثلاثاً. فلو رجع إليها نحكم ببطلانه إلا إذا كانت الرجعة في مورد صحيحة عندهم. فنتزوج بها في غير ذلك بعد انقضاء عدتها، و كذلك الزوجة إذا كانت شيعية جاز لها التزويج بالغير، ولا فرق في ذلك بين الطلاق ثلاثاً و غيره مما هو صحيح عندهم فاسد عندنا كالطلاق المعلق و الحلف به و في طهر المواقعة و الحيض و بغير شاهدين فنحكم بصحته إذا وقع من المخالف القائل بالصحة، و هذا الحكم جار في غير الطلاق أيضاً، فنأخذ بالعول و التعصيب منهم الميراث مثلاً مع بطلانهما عندنا، و التفصيل لا يسع هذا المختصر.

مسألة ٩ ـ يشترط في صحة الطلاق زائداً على مامرالاشهاد بمعنى إيقاعه بحضور شاهدين عدلين ذكرين يسمعان الانشاء، سواء قال لهما: اشهدا أم لا، و يعتبر اجتماعهما حين سماع الانشاء، فلو شهد أحدهما وسمع في مجلس ثم كرر اللفظ و سمع الآخر بانفراده لم يقع، نعم لو شهدا باقراره بالطلاق لم يعتبر اجتماعهما لا في تحمل الشهادة و لا في أدائها، ولا اعتبار بشهادة النساء و سماعهن لا منفردات ولا منضمات بالرجال.

مسألة ١٠ ـ لو طلق الوكيل عن الزوج لا يكتفى به مع عدل آخر في الشاهدين، كما لا يكتفى بالموكل مع عدل آخر.

مسألة ١١ ـ المراد بالعدل في هذا المقام ما هو المراد به في غيره مما رتب عليه بعض الأحكام كما مر في كتاب الصلاة.

مسألة ١٢ ـ لو كان الشاهدان عادلين في اعتقاد المطلق ـ أصيلاً كان أو وكيلاً ـ و فاسقين في الواقع يشكل ترتيب آثار الطلاق الصحيح لمن يطلع على فسقهما، و كذلك إذا كانا عادلين في اعتقاد الوكيل دون الموكل، فانه يشكل جواز

If he says: 'She is divorced thrice," thereby three divorces shall not take effect absolutely, and according to the stronger opinion a single divorce shall take effect, as in the preceding case.

Problem # 8. If the husband is a Sunnī who believes in three divorces taking effect by repeating the formula thrice by way of *mursalah* or *mukarrar*, and he makes it in one of these ways, it shall be binding on him, irrespective of the wife being a Shī'ah or Sunnī, according to us it shall have the consequences of a thrice divorced wife. If he intends to recall her, according to us it shall be void, except the case in which he intends to recall is valid among the Sunnīs. In case otherwise, according to us, a person may marry her after the completion of her *'Iddah*. Likewise, if the wife is a Shī'ah, she may marry another person. It makes no difference if the divorce is thrice or otherwise, if it is one that is valid among the Sunnīs and invalid among us like a contingent divorce, a divorce as a result of a vow, a divorce given in a period of purity in which the husband has copulated with the wife, or one given during course or without two witnesses, so that judgement shall be given in favour of their validity if it is given by a Sunni who believes in their validity. This rule applies in cases other than a divorce as well. So we make accept inheritance from them by *'Awl* or *Ta'ṣīb*, though they are void among us. Its details cannot be given in this short book.

Problem # 9. Besides what has already been mentioned, it is also a condition for the validity of a divorce that there must be two just, male witnesses who should listen to the initiation [of the formula of divorce], irrespective of their having been asked to bear testimony to it or not. It is also a condition that both of them should be present at the time of listening to the initiation [of the formula of divorce]. If one of them listens to it as a witness in a sitting, and repeats it before another and the other listens to it independently, it shall not take effect.

Of course, if they testify to his acknowledgement of divorce, their simultaneous presence is not a condition both at the time of being a witness and testifying to it. The testimony of witnesses has no legal value in a divorce, independently or in conjunction with men.

Problem # 10. If an agent divorces the wife on behalf of her husband, it shall not be sufficient for him to be one of the two witnesses for the divorce, in the same way as it shall not be sufficient for client to be accompanied by another just witness.

Problem # 11. By a just witness here is meant what has been meant in other cases on which some of the rules apply, as has been mentioned in the Section of Prayers (*Ṣalāt*).

Problem # 12. If two witnesses were just in the belief of the divorcing person, whether the divorce is pronounced by the husband personally or through an agent, but they are in fact depraved, there shall

ترتيب آثار الصحة عليه، بل الأمر فيه أشكل من سابقه.

القول في أقسام الطلاق

الطلاق نوعان: بدعي و سني، فالأول ـ هو غير الجامع للشرائط المتقدمة، و هو على أقسام فاسدة عندنا صحيحة عند غيرنا.

والثاني ـ ما جمع الشرائط في مذهبنا، و هو قسمان: بائن و رجعي، فالبائن ما ليس للزوج الرجوع إليها بعده، سواء كانت لها عدة أم لا، و هو ستة: الأول ـ الطلاق قبل الدخول، الثاني ـ طلاق الصغيرة أي من لم تبلغ التسع و إن دخل بها، الثالث ـ طلاق اليائسة، و هذه الثلاث ليست لها عدة كما يأتي، الرابع و الخامس ـ طلاق الخلع و المباراة مع عدم رجوع الزوجة فيما بذلت، و إلا كانت له الرجعة، السادس ـ الطلاق الثالث إذا وقع منه رجوعان إلى الزوجة في البين: بين الأول و الثاني و بين الثاني و الثالث ولو بعقد جديد بعد خروجها عن العدة.

مسألة ١ ـ لو طلقها ثلاثاً مع تخلل رجعتين حرمت عليه ولو بعقد جديد، ولا تحل له إلا بعد أن تنكح زوجاً غيره ثم فارقها بموت أو طلاق و انقضت عدتها و حينئذ جاز للأول نكاحها.

مسألة ٢ ـ كل امرأة حرة إذا استكملت الطلاق ثلاثاً مع تخلل رجعتين في البين حرمت على المطلق حتى تنكح زوجاً غيره، سواء واقعها بعد كل رجعة و طلقها في طهر آخر غير طهر المواقعة ـ وهذا يقال له: طلاق العدة ـ أو لم يواقعها، و سواء وقع كل طلاق في طهر أو وقع الجميع في طهر واحد، فلو طلقها مع الشرائط ثم راجعها ثم طلقها ثم راجعها ثم طلقها في مجلس واحد حرمت عليه فضلاً عما إذا طلقها ثم راجعها ثم تركها حتى حاضت و طهرت ثم طلقها و هكذا.

مسألة ٣ ـ العقد الجديد بحكم الرجوع في الطلاق، فلو طلقها ثلاثاً بينها عقدان مستأنفان حرمت عليه حتى تنكح زوجاً غيره سواء لم تكن لها عدة كما

be hesitation in the application of the consequences of a valid divorce by a person who knows about their depravity.

The same shall be the case if they were just in the belief of the agent but not in the belief of the client, in which case too there shall be hesitation to apply the consequences of a valid divorce to it. Rather the matter shall be more difficult in this case than in the previous one.

Chapter Three - Kinds of Divorce

There are two kinds of Divorce: Firstly, a Divorce given by way of *Bid'ah*, and Secondly, a Divorce given by way of *Sunnah*. The First Kind is the one that does not conform to the preceding conditions, and it has some invalid kinds according to us, but they are valid among others [i.e., the Sunnīs]. The Second Kind is one that conforms to the conditions prescribed in our faith. It has two kinds: *Bā'in* or irrevocable, and *Raj'ī* or revocable.

In a *Bā'in* or irrevocable divorce, the husband has no right to recall the wife after he has divorced her, irrespective of her requiring to observe *'Iddah* or not. They are of the following six categories: First, a Divorce given before consummation. Second, a Divorce given to a minor wife, i.e., a wife who has not attained the age of nine years, even if her marriage has been consummated. Third, a Divorce given to a *Yā'isah*, or a wife who is past child-bearing age. These three categories of divorcees are not required to observe *'Iddah*, as will be explained later. The Fourth and Fifth, *Khul'* and *Mubārāt* Divorces, when the wife has not demanded the ransom paid by her back from the husband; otherwise, [when the wife has demanded the ransom back from the husband], the husband shall be entitled to recall the wife. Sixth, the third Divorce, after two intervening recalls already taken place, i.e, between the first and the second, and between the second and third, even by way of concluding fresh contracts after her expiry of *'Iddah*.

Problem # 1. If a man divorces his wife thrice with two intervening recalls, she shall be rendered unlawful to him, even for contracting a new marriage, and is not rendered lawful to him except after she marries another man, and is separated from him by death or divorce, and expiry of the subsequent *'Iddah*, after which she shall be rendered lawful for the first husband [by contracting a new marriage].

Problem # 2. Every free woman who has completed three divorces with two intervening recalls is rendered unlawful to the divorcing husband until she marries another husband, irrespective of the husband having copulated with her after every recall or having divorced her in a period of purity other than the one in which he had copulated with her, which is called an *'Iddah* Divorce, or had not copulated with her , and whether each divorce has taken place in a period of purity or all of the divorces have taken place in a single period of purity.

So if the man divorces her according to the prescribed conditions, then recalls her, then divorces her, and again recalls her, and then recalls her in a single sitting, she shall be rendered unlawful to him let alone when he divorces her, then recalls her, then leaves her until she is upon courses and become pure of menses, and then divorces her, and so on.

Problem # 3. In a Divorce, a fresh contract is considered a recall. If a man divorces his wife thrice with two intervening fresh contracts, she shall be rendered unlawful to him, unless she marries a husband

إذا طلقها قبل الدخول، أو كانت ذات عدة و عقد عليها بعد انقضاء العدة.

مسألة ٤ ـ المطلقة ثلاثاً إذا نكحت زوجاً آخر و فارقها بموت أو طلاق حلت للزوج الأول و جاز له العقد عليها بعد انقضاء عدتها من الثاني فاذا طلقها ثلاثاً حرمت أيضاً حتى تنكح زوجاً آخر و إن كان ذلك الزوج هو الثاني في الثلاثة الأولى. و هكذا تحرم عليه بعد كل طلاق ثالث، و تحل بنكاح الغير بعده و إن طلقت مأة مرة، نعم لو طلقت تسعاً طلاق العدة بالتفسير الذي أشرنا إليه حرمت عليه أبداً، و ذلك بأن طلقها ثم راجعها ثم واقعها ثم طلقها في طهر آخر ثم راجعها ثم واقعها ثم طلقها في طهر آخر، فاذا حلت للمطلق بنكاح زوج آخر و عقد عليها ثم طلقها كالثلاثة الأولى ثم حلت بمحلل ثم عقد عليها ثم طلقها ثلاثاً كالأولين حرمت عليه أبداً، و يعتبر فيه أمران: أحدهما ـ تخلل رجعتين، فلا يكفي وقوع عقدين مستأنفين ولا رجعة و عقد مستأنف في البين، الثاني ـ وقوع المواقعة بعد كل رجعة، فطلاق العدة مركب من ثلاث طلقات: إثنتان منها رجعية و واحدة بائنة، فاذا وقعت ثلاثة منه حتى كملت تسع طلقات حرمت عليه أبداً، هذا و الأحوط الاجتناب عن المطلقة تسعاً مطلقا و إن لم تكن الجميع طلاق عدة.

مسألة ٥ ـ إنما يوجب التحريم الطلقات الثلاث إذا لم تنكح في البين زوجاً آخر. و أما إن تزوجت للغير انهدم حكم ما سبق و تكون كأنها غير مطلقة، و يتوقف التحريم على إيقاع ثلاث طلقات مستأنفة.

مسألة ٦ ـ قد مرّ أن المطلقة ثلاثاً تحرم حتى تنكح زوجاً غيره، و تعتبر في زوال التحريم به أمور ثلاثة: الأول ـ أن يكون الزوج المحلل بالغاً، فلا اعتبار بنكاح غير البالغ و إن كان مراهقاً، الثاني ـ أن يطأها قبلاً وطأ موجباً للغسل بغيبوبة الحشفة أو مقدارها من مقطوعها، بل كفاية المسمى في مقطوعها لا يخلو من قوة، و الاحتياط لا ينبغي تركه، و هل يعتبر الانزال؟ فيه إشكال، والأحوط اعتباره، الثالث ـ أن يكون العقد دائماً لامتعة.

مسألة ٧ ـ لو طلقها ثلاثاً و انقضت مدة و ادعت أنها تزوجت و فارقها الزوج

other than the first, irrespective of her not requiring an *'Iddah* as when the husband has divorced her before consummation, or she were to observe *'Iddah*, but he has married her after the expiry of the *'Iddah*..

Problem # 4. A thrice-divorced woman, who marries another husband and is separated from him by his death or divorce, is rendered lawful to the first, and he is allowed to contract marriage with her after the expiry of her *'Iddah* for the second husband. If he again divorces her thrice, she is again rendered unlawful to him unless she marries another husband, even if it were the second husband in case of the first three divorces. In like manner she is rendered unlawful after every three divorces, and is again rendered lawful after marrying another husband after him, even if she is divorced a hundred times. Of course, if he divorces her nine times by way of an *Iddah* Divorce already explained, she shall be rendered perpetually unlawful to him. This is when he divorces her, then recalls her and copulates with her, then divorces her in another period of purity, then recalls her and copulates with her, and again divorces her in another period of purity, so when she is rendered lawful to the divorcing husband by marrying another husband, and again the first husband divorces her in the manner of the first three divorces, then again she is rendered lawful through an intermediary husband, then again the first husband marries her , and again divorces her thrice like the previous two [three divorces], she shall be rendered perpetually unlawful to the first husband. There are two conditions in it. Firstly, two intervening recalls. It is neither sufficient to contract two fresh contracts, nor an intervening recall and a fresh contract. Secondly, the husband must perform of sexual intercourse after every recall. So an *'Iddah* Divorce consists of three repudiations, two of them are revocable, and one irrevocable. When three of them take place, completing nine repudiations, the woman is rendered perpetually unlawful to the husband. This is the law. It is more cautious to refrain from a nine-divorced woman absolutely, even if all of them were not *Iddah* divorces.

Problem # 5. Three divorces induce prohibition when the woman has not married another husband in between. But once she has married another husband, the previous prohibition is lifted, and she becomes like a woman not divorced at all, and the next prohibition depends on three divorces given to her anew.

Problem # 6. It has been mentioned that a thrice-divorced woman is rendered unlawful unless she marries another husband, and thee are three conditions for the elimination of the prohibition. Firstly, that the intermediary husband must be an adult, so that marriage with a minor shall have no legal value. .where it has circumcised. Rather sufficiency of what is called circumcised is not devoid of force. However, caution must not be given up. Whether discharge of semen is also a condition, there is hesitation in it, but to be more cautious, it must be a condition. Thirdly, the contract must be permanent and not temporary.

Problem # 7. If a man has divorced his wife thrice, and some time has passed, and she claims that she has married [another husband] and has separated from him and completed *'Iddah*, and there is

الثاني و مضت العدة و احتمل صدقها صدقت و يقبل قولها بلا يمين، فللزوج الأول أن ينكحها، و ليس عليه الفحص، و الأحوط الاقتصار على ما إذا كانت ثقة أمينة.

مسألة ٨ ـ لو دخل المحلل فادعت الدخول و لم يكذبها صدقت و حلت للزوج الأول، و إن كذبها فالأحوط الاقتصار في قبول قولها على صورة حصول الاطمئنان بصدقها، ولو ادعت الاصابة ثم رجعت عن قولها فان كان قبل أن يعقد الأول عليها لم تحل له، و إن كان بعده لم يقبل رجوعها.

مسألة ٩ ـ لا فرق في الوطء المعتبر في المحلل بين المحرم و المحلل، فلو وطأها محرماً كالوطء في الاحرام أو في الصوم الواجب أو في الحيض و نحو ذلك كفى في التحليل.

مسألة ١٠ ـ لو شك الزوج في إيقاع أصل الطلاق لم يلزمه و يحكم ببقاء علقة النكاح، و لو علم بأصله و شك في عدده بنى على الأقل، سواء كان الطرف الأكثر الثلاث أو التسع، فلا يحكم بالحرمة في الأول و بالحرمة الأبدية في الثاني، بل لو شك بين الثلاث و التسع يبني على الأول و تحل بالمحلل على الأشبه.

القول في العدد

إنما يجب الاعتداد بأمور ثلاثة: الفراق بطلاق أو فسخ أو انفساخ في الدائم، و انقضاء المدة أو بذلها في المتعة، و موت الزوج، و وطء الشبهة.

فصل في عدة الفراق
طلاقاً كان أوغيره

مسألة ١ ـ لا عدة على من لم يدخل بها و لا على الصغيرة، و هي من لم تكمل

likelihood of her word being true, it shall be confirmed, and her word shall be accepted without an oath. The first husband may marry her, and he is not required to investigate. It is more cautious to confine to her word, if she is honest and trustworthy.

Problem # 8. If the intermediary husband (*Muḥallil*) has had sexual intercourse with the woman and she claims that sexual intercourse has taken place with her, and he does not refute her, her word shall be confirmed and she shall be rendered lawful to the first husband. If, however, the former refutes her, then to be more cautious the acceptance of her word shall be confined to the case when satisfaction is obtained as to the truth of her statement. If she claims to have been enjoyed by the intermediary husband, and then falls upon her back, if it were before the first husband contracts fresh marriage with her, she shall not be lawful to him, and if it were after the fresh contract, no heed shall paid to her revocation.

Problem # 9. There is no difference in the intercourse required as a condition by the intermediary husband whether it is lawful or unlawful. So if he performs the intercourse while tying *Iḥrām* or during obligatory fast or during the woman's courses, or the like, it is shall be sufficient to legalise her [for the first husband to marry her].

Problem # 10. If a man doubts whether actual divorce has taken place or not, it shall not be declared binding, and judgement shall be given in favour of the subsistence of the marital tie. If he is sure about the divorce, but doubts about its number, judgement shall be given in favour of its least number, irrespective of the maximum being the third or the ninth, so that in the first instance it shall not be declared unlawful and in the second perpetual unlawful. Rather if he doubts whether it is the third or the ninth, it shall be declared to be the third, and shall be legalised through an intermediary husband.

Chapter Four - Laws relating to *'Iddah*

A woman is bound to observe *'Iddah* in the following three cases : a separation by divorce, deliberate dissolution or automatic dissolution of marriage in a permanent marriage, expiry of the period or its excuse by the husband in a temporary marriage, and death of the husband or an intercourse under a semblance of right.

I – Laws relating to *'Iddah* for Separation by Divorce or Otherwise

Problem # 1. A woman is not required to observe *'Iddah* if she has not been sexually enjoyed by her husband or she is a minor, or one who has not attained the age of nine years even if enjoyed by her

التسع و إن دخل بها، و لا على اليائسة سواء بانت في ذلك كله بطلاق أو فسخ أو هبة مدة أو انقضائها.

مسألة ٢ ـ يتحقق الدخول بايلاج تمام الحشفة قبلاً أو دبراً و إن لم ينزل، بل و إن كان مقطوع الأنثيين.

مسألة ٣ ـ يتحقق اليأس ببلوغ ستين في القرشية و خمسين في غيرها. و الأحوط مراعاة الستين مطلقا بالنسبة إلى التزويج بالغير و خمسين كذلك بالنسبة إلى الرجوع إليها.

مسألة ٤ ـ لو طلقت ذات الأقراء قبل بلوغ سن اليأس و رأت الدم مرة أو مرتين ثم يئست أكملت العدة بشهرين أو شهر، و كذلك ذات الشهور إذا اعتدت شهراً أو شهرين ثم يئست أتمت ثلاثة.

مسألة ٥ ـ المطلقة و من ألحقت بها إن كانت حاملاً فعدتها مدة حملها، و تنقضي بأن تضع ولو بعد الطلاق بلا فصل، سواء كان تاماً أو غيره ولو كان مضغة أو علقة إن تحقق أنه حمل.

مسألة ٦ ـ انما تنقضي العدة بالوضع إذا كان الحمل ملحقاً بمن له العدة، فلا عبرة بوضع من لم يلحق به في انقضاء عدته، فلو كانت حاملاً من زنا قبل الطلاق أو بعده لم تخرج منها به، بل يكون انقضاؤها بالأقراء و الشهور كغير الحامل، فوضع الحمل لا أثر له أصلا، نعم إذا حملت من وطء الشبهة قبل الطلاق أو بعده بحيث يلحق الولد بالواطىء لا بالزوج فوضعه سبب لانقضاء العدة بالنسبة إليه لا الزوج المطلق.

مسألة ٧ ـ لو كانت حاملاً باثنين فالأقوى عدم البينونة إلا بوضعهما فللزوج الرجوع بعد وضع الأول، لكن لا ينبغي ترك الاحتياط، ولا تنكح زوجاً إلا بعد وضعهما.

مسألة ٨ ـ لو وطئت شبهة فحملت و ألحق الولد بالواطىء لبعد الزوج عنها أو لغير ذلك ثم طلقها أو وطئت شبهة بعد الطلاق على نحو ألحق الولد بالواطىء

husband, or if she is past child-bearing age (*Yā'isah*), irrespective of such woman having been separated by a divorce, or dissolution of marriage, or excuse or expiry of her period [in a temporary marriage].

Problem # 2. Sexual intercourse is considered to have taken place by the penetration of the whole glans penis naturally or unnaturally, even if without discharge of semen, rather even if the husband is one both testicles of whom have been removed.

Problem # 3. A woman is considered to be past child-bearing age if she has attained sixty years of age if she is a *Qarashiyyah*, and fifty years in other cases. To be more cautious absolute observation of sixty years should be made when marrying with another, and fifty years in case of recalling her.

Problem # 4. If a woman who is reckoned by *Qur's* is divorced before reaching the past child-bearing age, and has seen the courses once of twice, and then reaches the past child-bearing age, she shall complete her *'Iddah* by two or one month. Likewise, a woman reckoning by months, when she has observed *'Iddah* for one or two months and then reaches the past child-bearing age shall complete the third month.

Problem # 5. A divorced woman or those affiliated with her, if pregnant, shall observe *'Iddah* until the delivery, and it shall be completed by her delivering a child even if just after the divorce, irrespective of the child being complete or otherwise, even if it were a lump of flesh or coagulated blood provided that it is established that it is a foetus.

Problem # 6. An *'Iddah* terminates by delivery of the child provided the pregnancy belongs to the husband for whom the woman is observing it. In case the delivery does not belong to the husband for whom she is observing *'Iddah*,it shall have no effect in the termination of the *'Iddah*. If a woman conceives due to an illicit intercourse before divorce or after it, she shall not be released of it after the delivery of the child. Rather the termination of her *'Iddah* shall be reckoned by *Qur's* or months, like a non-pregnant woman, and the delivery shall have no effect in it at all.If, however, she conceives as a result of an intercourse under a semblance of right before or after a divorce in a way that the child is affiliated to the man having copulated under a semblance of right and not to the husband, the delivery of the child shall terminate the *'Iddah* for the intercourse under a semblance of right and not for the divorce.

Problem # 7. If a woman is pregnant with twins, according to the stronger opinion, termination of her *'Iddah* shall take place after the delivery of both, though the husband may recall her after the delivery of the first, though caution must not be given up, and she should not marry another husband except after the delivery of both.

Problem # 8. If a woman is subjected to an intercourse under a semblance of right and consequently conceives, and the child is affiliated to the man having intercourse with her under a semblance of right due to her actual husband being away or otherwise, and then her husband divorces her, or she is

كانت عليها عدتان: عدة لوطء الشبهة تنقضي بالوضع، وعدة للطلاق تستأنفها فيما بعده، و كان مدتها بعد انقضاء نفاسها إذا اتصل بالوضع ولو تأخر دم النفاس يحسب النقاء المتخلل بين الوضع و الدم قرءً من العدة الثانية ولو كان بلحظة.

مسألة ٩ ـ لو ادعت المطلقة الحامل أنها وضعت فانقضت عدتها و أنكر الزوج أو انعكس فادعى الوضع و انقضاء العدة و أنكرت هي أو ادعت الحمل و أنكر أو ادعت الحمل و الوضع معاً و أنكرهما يقدم قولها بيمينها بالنسبة إلى بقاء العدة و الخروج منها لا بالنسبة إلى آثار الحمل غير ما ذكر على الظاهر.

مسألة ١٠ ـ لو اتفق الزوجان على إيقاع الطلاق و وضع الحمل و اختلفا في المتقدم و المتأخر فقال الزوج: «وضعت بعد الطلاق فانقضت عدتك» و قالت: «وضعت قبله و أنا في العدة» أو انعكس لا يبعد تقديم قولها في بقاء العدة و الخروج منها مطلقا من غير فرق بين ما لم يتفقا على زمان أحدهما أو اتفقا عليه.

مسألة ١١ ـ لو طلقت الحائل أو انفسخ نكاحها فان كانت مستقيمة الحيض بأن تحيض في كل شهر مرة كانت عدتها ثلاثة قروء، و كذا إذا تحيض في كل شهر أزيد من مرة أو ترى الدم في كل شهرين مرة، و بالجملة كان الطهر الفاصل بين حيضتين أقل من ثلاثة أشهر، و إن كانت لا تحيض وهي في سن من تحيض ـ إما لكونها لم تبلغ الحد الذي ترى الحيض غالب النساء و إما لانقطاعه لمرض أو حمل أو رضاع ـ كانت عدتها ثلاثة أشهر، و يلحق بها من تحيض لكن الطهر الفاصل بين حيضتين منها ثلاثة أشهر أو أزيد.

مسألة ١٢ ـ المراد بالقروء الأطهار، و يكفي في الطهر الأول مسماه ولو قليلاً، فلو طلقها و قد بقيت منه لحظة يحسب ذلك طهراً، فاذا رأت طهرين آخرين تامين بتخلل حيضة بينهما انقضت العدة، فانقضاؤها برؤية الدم الثالث، نعم لو اتصل آخر صيغة الطلاق بأول زمان الحيض صحّ الطلاق، لكن لابد في انقضاء العدة من أطهار تامة، فتنقضي برؤية الدم الرابع، كل ذلك في الحرة.

subjected to an intercourse under a semblance of right after being divorced in a way that the child is affiliated to the man copulating with her under a semblance of right, she

shall be required to observe two *Iddahs*, the *'Iddah* for the intercourse under a semblance terminating with the delivery, and the *'Iddah* for the divorce starting after the delivery which will terminate with the termination of her puerperal blood if it has continued since the delivery. If, however, the puerperal blood is delayed, the intervening purity between the delivery and the puerperal blood shall be reckoned as part of the second *'Iddah* even if it were for a *laḥẓah*, or a moment.

Problem # 9. If a pregnant divorced woman claims that she has delivered and so her *'Iddah* has terminated, but her husband denies it, or vice versa when the husband claims the delivery and termination of the *'Iddah* , and she denies it and claims to be still pregnant, or she claims to be pregnant and the husband denies it, or she claims to be pregnant and delivery together and the husband denies both, her word shall be entertained when followed by her oath relating to the continuation of the *'Iddah* and its termination but apparently not relating to the consequences of pregnancy other than what have been mentioned here.

Problem # 10. If both the spouses agree as to the divorce taking place as well as delivery, but they disagree on one being before or after the other, so that the husband says [to the wife]: "You have delivered after the divorce, so your *'Iddah* has terminated," while the wife says: "I have delivered before it and so I am still observing *'Iddah*, or vice versa, it is not far from preferring her word relating to the continuation of the *'Iddah* and release from it absolutely without there being difference between their disagreement over the time of either of the two and agreement on it.

Problem # 11. If a non-pregnant woman is divorced or her marriage is dissolved, if she was normal in courses having courses once a month, her *'Iddah* shall be three *Qur's*. The same shall be the case if she has courses more than once in every month or has courses once in every two months, in short her period of purity between two courses being less than three months. If she has no courses despite being in the age of those who have courses, either due to her not attaining the limit in which most of the women have courses, or due to its termination owing to some illness, pregnancy or suckling, her *'Iddah* shall be for three months. To this category is affiliated a woman who has courses, but her period of purity between two courses is three months or more.

Problem # 12. By *Qur's* is meant the periods of purity. In the first period of purity, it is sufficient to call it a period of purity even if it is for a short time. So if a man divorces his wife, and there remains a moment (*Laḥẓah*), it shall be reckoned a period of purity. When she has had two other complete periods of purity by a menstruation intervening between the two, her *'Iddah* shall terminate, so that its termination shall take place with the start of the third course. Of course, if the last *Ṣīghah* of divorce coincides with the beginning of the courses, the divorce shall be valid, but it is indispensable for the termination of the *'Iddah* that there should be complete periods of purity, so that it terminates with the start of the fourth menses. All these laws relate to a free woman.

مسألة ١٣- بناءً على كفاية مسمى الطهر في الطهر الأول ولو لحظة و إمكان أن تحيض المرأة في شهر واحد أزيد من مرة فأقل زمان يمكن ان تنقضي عدة الحرة ستة و عشرون يوماً و لحظتان، بأن كان طهرها الأول لحظة ثم تحيض ثلا ثة أيام، ثم ترى أقل الطهر عشرة أيام، ثم تحيض ثلا ثة أيام، ثم ترى أقل الطهر عشرة أيام، ثم تحيض، فبمجرد رؤ ية الدم الأخير لحظة من أوله انقضت العدة، وهذه اللحظة الأخيرة خارجة عن العدة، و انما يتوقف عليها تمامية الطهر الثالث، هذا في الحرة، وأما في الأمة فأقل ما يمكن انقضاء عدتها لحظتان وثلا ثه عشر يوماً.

مسألة ١٤ ـ عدة المتعة في الحامل وضع حملها، و في الحائل إذا كانت تحيض قرءان، و المراد بهما هنا حيضتان على الأقوى و إن كانت لا تحيض وهي في سن من تحيض فخمسة و أربعون يوماً، و المراد من الحيضتين الكاملتان، فلو وهبت مدتها أو انقضت في أثناء الحيض لم تحسب بقية تلك الحيضة من الحيضتين.

مسألة ١٥ ـ المدار في الشهور هو الهلالي، فان وقع الطلاق في أول رؤ ية الهلال فلا اشكال ، و إن وقع في أثناء الشهر ففيه خلاف و إشكال، و لعل الأقوى في النظر جعل الشهرين الوسطين هلاليين و إكمال الأول من الرابع بمقدار مافات منه.

مسألة ١٦ ـ لو اختلفا في انقضاء العدة و عدمه قدم قولها بيمينها، سواء ادعت الانقضاء أو عدمه، و سواء كانت عدتها بالأقراء أو الأشهر.

القول في عدة الوفاة

مسألة ١ ـ عدة المتوفى عنها زوجها أربعة أشهر و عشرة أيام إذا كانت حائلاً، صغيرة كانت أو كبيرة، يائسة كانت أو غيرها، مدخولاً بها كانت أم لا، دائمة كانت أو منقطعة، من ذوات الأقراء كانت أولا. و إن كانت حاملاً فأبعد الأجلين من وضع الحمل و المدة المزبورة.

Problem # 13. If it is accepted that it is sufficient to call even a moment (*Laḥẓah*) a period of purity in the fist period of purity, and it were possible for a woman to have courses more than once in a month, the minimum possible period for the termination of *'Iddah* for a free woman shall be twenty six days and two moments (*Laḥẓahs*), in the way that her first period of purity may be for a moment (*Laḥẓah*) and then she should have courses for three days, and then have a minimum period of purity for ten days, and then against have courses for three days, and again have a minimum period of purity for ten days, and again have courses, and immediately after having the latest courses for a moment (*Laḥẓah*) at the very outset, her *'Iddah* shall be over, while this last moment (*Laḥẓah*) shall not form part of her *'Iddah*, and only the termination of the third period of purity shall depend on it. This is the case when the woman is a free woman. In case, however, of a slave woman the minimum period for the termination of her *'Iddah* are two moments (*Laḥẓahs*) and thirteen days.

Problem # 14. The *'Iddah* for a temporary pregnant wife is the delivery of her foetus, while in case of a non-pregnant woman it is two *Qur's* in case she has courses, by which is meant here two courses, according to the stronger opinion, but in case she is one who has no courses though she is in age when her equals do have menses, it shall be for forty-five days. Here two courses mean two complete courses. If she is excused her (remaining) period of temporary marriage or its period terminates during the currency of the courses, the remaining part of that course shall not be reckoned in two courses.

Problem # 15. The criterion in reckoning months, according to the prevalent opinion, is the lunar month. So if the divorce takes place on the first day of the sight of the moon, there shall be no difficulty. In case, however, it takes place during the month, then there is difference of opinion and difficult in it. Probably it would be according to the stronger opinion to reckon the middle two lunar months and complete the amount of deficit of the first month from the fourth month.

Problem # 16. If the spouses differ as to the termination of the *'Iddah*, the word of the wife shall carry if followed by her oath, irrespective of her claim being in favour of against the termination of the *'Iddah*, and whether her *'Iddah* is reckoned by *Qur's* or by months.

II – Laws relating to the *'Iddah* on Husband's Death

Problem # 1. The *'Iddah* on the husband's death is for four months and ten days when the wife is not pregnant, irrespective of her being a minor or an adult, of past child-bearing age or otherwise, having been enjoyed or not, and whether permanent or temporary, and whether her *'Iddah* is reckoned by *Qur's* or months.

مسألة ٢ ـ المراد بالأشهر هي الهلالية، فان مات عند رؤية الهلال اعتدت بأربعة أشهر وضمت إليها من الخامس عشرة أيام، و إن مات في أثناء الشهر فالأظهر أنها تجعل ثلاثة أشهر هلاليات في الوسط و أكملت الأول بمقدار ما مضى منه من الشهر الخامس حتى تصير مع التلفيق أربعة أشهر وعشرة أيام.

مسألة ٣ ـ لو طلقها ثم مات قبل انقضاء العدة فان كان رجعياً بطلت عدة الطلاق، و اعتدت من حين موته عدة الوفاة إلا في المسترابة بالحمل فان فيها محل تأمل، فالأحوط لها الاعتداد بأبعد الأجلين من عدة الوفاة و وظيفة المسترابة، فاذا مات الزوج بعد الطلاق بشهر مثلاً تعتد عدة الوفاة و تتم عدة المسترابة إلى رفع الريبة و ظهور التكليف، ولومات بعد سبعة أشهر اعتدت بأبعدهما من اتضاح الحال وعدة الوفاة، ولو كانت المرأة حاملاً اعتدت بأبعد الأجلين منها و من وضع الحمل كغير المطلقة، و إن كان بائناً اقتصرت على إتمام عدة الطلاق و لا عدة لها بسبب الوفاة.

مسألة ٤ ـ يجب على المرأة في وفاة زوجها الحداد ما دامت في العدة و المراد به ترك الزينة في البدن بمثل التكحيل و التطيب و الخضاب و تحمير الوجه و الخطاط و نحوها، و في اللباس بلبس الأحمر و الأصفر و الحلي و نحوها و بالجملة ترك كل ما يعد زينة تتزين به للزوج، و في الأوقات المناسبة له في العادة كالأعياد و الأعراس و نحوهما، و يختلف ذلك بحسب الأشخاص و الأزمان و البلاد، فيلاحظ في كل بلد ماهو المعتاد و المتعارف فيه للتزيين نعم لا بأس بتنظيف البدن و اللباس، و تسريح الشعر، و تقليم الأظفار، و دخول الحمام، و الافتراش بالفراش الفاخر و السكنى في المساكن المزينة، و تزيين أولادها و خدمها.

مسألة ٥ ـ الأقوى أن الحداد ليس شرطاً في صحة العدة، بل هو تكليف مستقل في زمانها، فلو تركته عصياناً أو جهلاً أو نسياناً في تمام المدة أو بعضها لم يجب عليها استئنافها و تدارك مقدار ما اعتدت بدونه.

In case, however, she is pregnant, she shall observe *'Iddah* for the delivery of the child or the said period whichever is longer.

Problem # 2. By months here are meant the lunar months. If the husband has died on the first day of the sight of the moon, the wife shall observe *'Iddah* for four months and add ten days from the fifth months. If, however, he has died during the months, then apparently she shall observe *'Iddah* for three months in the middle and complete the deficit of the first month from the fifth month until the period of four months and ten days is completed.

Problem # 3. If a man divorces his wife and then dies before the termination of the *'Iddah*, then if it was a revocable divorce, the *'Iddah*[for divorce] shall be rendered void, and she shall be required to observe the *'Iddah* for the husband's death from the time of his death, except when she is doubtful about her being pregnant, in which there shall be hesitation, the more cautious for her being the observation of the husband's death and the one observed by a *Mustarābah* whichever is longer. If the husband has died, suppose, after one month of the divorce, she shall observe the *'Iddah* for the husband's death and complete the *'Iddah* of a *Mustarābah* until the removal of the doubt and clearance of her position.

If the husband has died after seven months of the divorce, she shall observe *'Iddah* required after the clearance of her position or for the husband's death whichever is longer.

If the woman is pregnant, she shall observe *'Iddah* for the longer period of the two since the delivery of the child like a woman who is not divorced. If the divorce is irrevocable, the woman shall confine herself to the observation of the *'Iddah* for divorce and she shall not be required to observe *'Iddah* for the husband's death.

Problem # 4. In the even of the death of a woman's husband, she is required to observe Ḥ*idād* until the expiry of the *'Iddah*. By *Ḥidād* is meant abstinence from physical embellishment like applying antimony, perfumes, hair colour, rouge, lining of the eyes or the like, and in clothes by wearing red or yellow clothes or jewellery or the like, in short everything that is considered embellishment used by the wife for the husband or at the suitable events according to the custom and usage like the festivals, weddings and the like.

It differs with the difference of individuals, times and places. So the woman must observe what is prevalent in decoration and embellishment according to the custom and usage of her city or country. Of course, there is no objection in cleaning the body and clothes, combing hair, cutting nails, going to public baths, using rich carpets, residing in decorated houses, adorning her children and servants.

Problem # 5. According to the stronger opinion, observation of *Ḥidād* is not a condition for the validity of the *'Iddah*. Rather it is an independent obligation required at its own time. So if the woman has given up by way of violation of the obligation, its ignorance of forgetfulness during the whole or part of the period, she is not required to observe it anew or compensate for the period she has observed *'Iddah* without observing *Ḥidād*..

مسألة ٦ ـ لافرق في وجوب الحداد بين المسلمة و الذمية، كما لافرق على الظاهر بين الدائمة و المنقطعة، نعم لا يبعد عدم وجوبه على من قصرت مدة تمتعها كيوم أو يومين، و هل يجب على الصغيرة و المجنونة أم لا؟ قولان أشهرهما الوجوب بمعنى وجوبه على وليها. فيجنبها عن التزيين ما دامتا في العدة، و فيه تأمل و إن كان أحوط.

مسألة ٧ ـ يجوز للمعتدة بعدة الوفاة أن تخرج من بيتها في زمان عدتها و التردد في حوائجها خصوصاً إذا كانت ضرورية أو كان خروجها لأمور راجحة كالحج و الزيارة و عيادة المرضى و زيارة أرحامها و لا سيما و الديها، نعم ينبغي بل الأحوط أن لا تبيت إلا في بيتها الذي كانت تسكنه في حياة زوجها، أو تنتقل منه إليه للاعتداد بأن تخرج بعد الزوال و ترجع عند العشي أو تخرج بعد نصف الليل و ترجع صباحاً.

مسألة ٨ ـ لا إشكال في أن مبدأ عدة الطلاق من حين وقوعه حاضراً كان الزوج أو غائباً بلغ الزوجة الخبر أم لا، فلو طلقها غائباً و لم يبلغها إلا بعد مضي مقدار العدة فقد انقضت عدتها، و ليس عليها عدة بعد بلوغ الخبر، و مثل عدة الطلاق عدة الفسخ و الانفساخ على الظاهر، و كذا عدة وطء الشبهة و إن كان الأحوط الاعتداد من حين ارتفاع الشبهة بل هذا الاحتياط لا يترك ، و أما عدة الوفاة فان مات الزوج غائبا فهي من حين بلوغ الخبر إليها، و لا يبعد عدم اختصاص الحكم بصورة غيبة الزوج، بل يعم صورة حضوره إن خفي عليها موته لعلة، فتعتد من حين إخبارها بموته.

مسألة ٩ ـ لا يعتبر في الاخبار الموجب للاعتداد من حينه كونه حجة شرعية كعدلين و لا عدل واحد، نعم لا يجوز لها التزويج بالغير بلا حجة شرعية على موته، فاذا ثبت ذلك بحجة يكفي اعتداده من حين البلوغ، و لا يحتاج إليه من حين الثبوت.

مسألة ١٠ ـ لو علمت بالطلاق و لم تعلم وقت وقوعه حتى تحسب العدة من

Problem # 6. There is no difference between a Muslim woman and *Dhimmiyyah* in the obligation of *Ḥidād*, as also apparently there is no difference between a permanent and temporary wife. Of course, it is not far from the absence of obligation in case the period for the temporary marriage is too short as for a day or two. Whether it is obligatory on a minor and insane woman or not; there are two opinions on it, the more prevalent being in favour of the obligation in the sense that its liability shall be on their guardian, who should make them refrain from embellishments as long they are observing *'Iddah*, but there is hesitation in it, though it is more cautious.

Problem # 7. A woman observing an *'Iddah* for husband's currency of the *'Iddah* and go after the fulfilment of her necessary needs, or when her exit is for the performance of preferable acts like the performance of Ḥajj, pilgrimage to some holy shrine, visiting some sick person or her kinsmen, especially her parents. Of course, she should, rather it is more cautious for her, not to pass the night except in the house where she lived during the lifetime of her husband, or shift to the house where she is observing *'Iddah*, so that she may go out in the afternoon and return by the evening, or go out after midnight and return by the morning.

Problem # 8. There is no objection to reckon the start of the *'Iddah* for divorce with effect from its pronouncement, irrespective of the husband being present or absent, and whether its information has reached the wife or not. If the husband divorces his wife while away from her and she does not receive its information except after the passage of part of the *'Iddah*, it shall terminate forthwith, and she shall not be required to observe it after the receipt of the information. The *'Iddah* for the deliberate and automatic dissolution of marriage shall apparently be like the *'Iddah* for divorce, and so is the *'Iddah* for an intercourse under a semblance of right, though it is more cautious to observe it from the timeof the removal of the suspicion. Rather this caution must not be given up.

As regards the *'Iddah* for the husband's death, if the husband has died whileaway from the wife, then it shall be obligatory since the receipt of information by her. It is not far from being absence of the speciality of the law for the case of husband's absence. Rather it shall be applicable even if case the husband is present, if the information about his death has been kept secret from her due to some reason, so that she shall observe the *'Iddah* since the receipt of the information about the husband's death.

Problem # 9. In the information about the husband's death that leads to the observation of the *'Iddah*, it is not necessary that it should be conveyed by two just persons and not one just person in order to be a legal evidence. Of course, it shall not be lawful for the woman to marry another husband without the legal evidence about the husband's death. When it is established by evidence, it is sufficient for her to observe *'Iddah* for the husband's death since the receipt of its information, and it is not required to be since its establishment [by evidence].

Problem # 10. If the wife has knowledge about the divorce, but does not know about its time of pronouncement in order to observe *'Iddah* since that time, she shall observe the *'Iddah* since the time she believes that the divorce would have not been pronounced later than that, though it is more

ذلك الوقت اعتدت من الوقت الذي تعلم بعدم تأخره عنه، و الأحوط أن تعتد من حين بلوغ الخبر إليها، بل هذا الاحتياط لا يترك .

مسألة ١١ ـ لو فقد الرجل وغاب غيبة منقطعة و لم يبلغ منه خبر و لا ظهر منه أثر و لم يعلم موته و حياته فان بقي له مال تنفق به زوجته أو كان له ولي يتولى أموره و يتصدى لانفاقه أو متبرع للانفاق عليها وجب عليها الصبر والانتظار، ولا يجوز لها أن تتزوج أبداً حتى تعلم بوفاة الزوج أو طلاقه، و إن لم يكن ذلك فان صبرت فلها ذلك ، و إن لم تصبر، وأرادت الزواج رفعت أمرها إلى الحاكم الشرعي، فيؤجلها أربع سنين من حين الرفع إليه ثم يتفحص عنه في تلك المدة، فان لم يتبين موته و لا حياته فان كان للغائب ولي أعني من كان يتولى أموره بتفويضه أو توكيله يأمره الحاكم بطلاقها، و إن لم يقدم أجبره عليه، و إن لم يكن له ولي أو لم يقدم و لم يمكن إجباره طلقها الحاكم، ثم تعتد أربعة أشهر و عشراً عدة الوفاة، فاذا تمت هذه الأمور جاز لها التزويج بلا إشكال، و في اعتبار بعض ما ذكر تأمل و نظر، إلا أن اعتبار الجميع هو الأحوط.

مسألة ١٢ ـ ليس للفحص و الطلب كيفية خاصة، بل المدار ما يعد طلباً و فحصاً، و يتحقق ذلك ببعث من يعرف المفقود ـ رعاية ـ باسمه و شخصه أو بحليته إلى مظان وجوده للظفر به و بالكتابة و غيرها كالتلغراف و سائر الوسائل المتداولة في كل عصر ليتفقد عنه، و بالالتماس من المسافرين كالزوار و الحجاج و التجار و غيرهم بأن يتفقدوا عنه في مسيرهم و منازلهم و مقامهم، و بالاستخبار منهم حين الرجوع.

مسألة ١٣ ـ لا يشترط في المبعوث و المكتوب إليه و المستخبر منهم من المسافرين العدالة، بل تكفي الوثاقة.

مسألة ١٤ ـ لا يعتبر أن يكون الفحص بالبعث أو الكتابة و نحوها من الحاكم، بل يكفي كونه من كل أحد حتى نفس الزوجة إذا كان بأمره بعد رفع الأمر إليه.

cautious for her to observe it since the receipt of the information by her. Rather this caution must not be given up.

Problem # 11. If the husband is missing, and he has been absent indefinitely, and there is no news about him, and there is no trace of him, without there being any knowledge abo9ut his life or death, then if there is some property belonging to him, his wife shall be maintain with it, of if he has some guardian to manage his affairs and take the charge of her maintenance, or there is some volunteer to maintain her, she shall be bound to have patience and wait, and it shall not be lawful for her at all to marry another husband until she receives information about her husband's death or his divorce to her. In case otherwise, if she is willing to wait, well and good.

If, however, she is not willing to wait, and intends to marry another husband, her case shall be referred to the judge of a *Sharī'ah* Court. The judge shall grant her a period of four years since the reference of her case to him. Then he shall make a search for the missing husband during that period. If it does not transpire whether the man is alive or dead, then if he has a guardian, i.e. one who manages his affairs through his authorization or appointment as agent, the judge shall order him to divorce the wife [of the missing person], and if he fails to take action, the judge shall compel him to do so. If, however, the missing person has no guardian, or he fails to take action, and it is not possible to compel him, the judge shall divorce the woman. Then the woman shall observe the *'Iddah* for the husband's death for four months and ten days. After the completion of all these formalities, the wife shall be at liberty to marry [another husband]. In some of the formalities mentioned above being a condition there is hesitation and difference of opinion, except that the compliance of all these formalities is more cautious.

Problem # 12. There is no special procedure for carrying out the search and investigation, and the criterion for it to exercise what is considered as such. It is fulfilled by sending some one who knows the missing person as to his name, personality and features to the place he is likely to be found in order to be successful, or by correspondence, etc. like telegraph and other prevalent means available at all times in order for his search, or by enquiring the passengers like the pilgrims, Ḥājīs, tradesmen, etc. to make search for him on their way, places of stay or residence, and by asking them to give information about him.

Problem # 13. *'Adālat* , or moral uprightness is not a condition in those who are sent, to whom the communication is addressed or those who are asked to give information about him from among the passengers, but their trustworthiness is sufficient.

Problem # 14. It is not a condition that the search through sending some one or correspondence or the like be carried out by the judge. Rather it is sufficient if it is carried out by any individual, including even the wife herself, when it is done by his order after the reference of the case to him.

مسألة ١٥ ـ مقدار الفحص بحسب الزمان أربعة أعوام، ولا يعتبر فيه الاتصال التام، بل هو على الظاهر نظير تعريف اللقطة سنة كاملة يكفي فيه ما يصدق عرفاً أنه قد تفحص عنه في تلك المدة.

مسألة ١٦ ـ المقدار اللازم من الفحص هو المتعارف لأمثال ذلك و ما هو المعتاد، فلا يعتبر استقصاء الممالك و البلاد، و لا يعتنى بمجرد إمكان وصوله إلى مكان و لا بالاحتمالات البعيدة، بل انما يتفحص عنه في مظان وجوده فيه و وصوله إليه و ما احتمل فيه احتمالاً قريباً.

مسألة ١٧ ـ لو علم أنه قد كان في بلد معين في زمان ثم انقطع أثره يتفحص عنه أولاً في ذلك البلد على المعتاد، فيكفي التفقد عنه في جوامعه و مجامعه و أسواقه و متنزهاته ومستشفياته و خاناته المعدة لنزول الغرباء و نحوها، و لا يلزم استقصاء تلك المحال بالتفتيش أو السؤال، بل يكفي الاكتفاء بما هو المعتد به من مشتهراتها، و ينبغي ملاحظة زي المفقود وصنعته و حرفته، فيتفقد عنه في المحال المناسبة له و يسأل عنه من أبناء صنفه و حرفته مثلاً، فاذا تم الفحص في ذلك البلد و لم يظهر منه أثر و لم يعلم موته ولا حياته فان لم يحتمل انتقاله إلى محل آخر بقرائن الأحوال سقط الفحص و السؤال، و اكتفي بانقضاء مدة التربص أربع سنين، و إن احتمل الانتقال فان تساوت الجهات فيه تفحص عنه في تلك الجهات، ولا يلزم الاستقصاء التام، بل يكفي الاكتفاء ببعض المحال المهمة و المشتركة في كل جهة مراعياً للأقرب ثم الأقرب إلى البلد الأول، و إن كان الاحتمال في بعضها أقوى جاز جعل محل الفحص ذلك البعض و الاكتفاء به، خصوصاً اذا بعد احتمال انتقاله إلى غيره، و إذا علم أنه قد كان في مملكة أو سافر إليها ثم انقطع أثره كفى أن يتفحص عنه مدة التربص في بلادها المشهورة التي تشد إليها الرحال، و إن سافر إلى بلد معين من مملكة كالعراق سافر إلى خراسان يكفي الفحص في البلاد و المنازل الواقعة في طريقه إلى ذلك البلد و في نفس ذلك البلد، و لا ينظر إلى الأماكن البعيدة عن الطريق فضلاً عن البلاد

Problem # 15. The time limit for making search for the missing person is four years, without there being any condition its being without interval. It is rather apparently like the complete year in case of a lost and found thing (*Luqaṭah*) in which what is customary is sufficient to be considered for the search having been made during that period.

Problem # 16. The amount of search is what is customary in such cases and what is usual. It is not a condition to make the search in all the towns and countries, and no heed is to be paid by mere possibility of the arrival of the missing person in such places or in case of a distant possibility. Rather the search is to be made where there is strong possibility of his arrival, and where he is likely to be found according to a closer probability.

Problem # 17. If he is known to be present in a definite place at a time since when his information has discontinued, he is to be searched in that town first according to what is usual. It shall be sufficient to make search for him in the gatherings, markets, centres of amusement, hospitals and inns usually meant for foreigners' stay, or the like, and it is necessary to make impossible enquiry by investigation and interrogation. Rather it is sufficient to search for him in their well-known places. Consideration must be made for the dress of the missing person, his trade, and profession, so that his search is carried out in suitable places from those belonging to his trade and profession.

If the enquiry is that town is complete and no trace of the missing person is found there, nor anything is known about his life or death, if there is no likelihood of his shifting to another place according to the circumstances, the search and enquiry shall be dropped, and the expiry of the period of four years for the search shall suffice. If there is likelihood of his shifting to some other places, and there is equal possibility of his shifting to the places, search shall be carried out in those directions, but it is not necessary to make a complete search. Rather it shall be sufficient to carry out the search in some of the important and common places in every direction keeping in view their proximity to the first town. If there is a stronger possibility in some of the places, it shall be allowed to make the search in only those places and that is all, particularly when there is a distant possibility of his shifting to places other than those places.

If it is known that he was in a particular country or he had travelled to it, and from there his whereabouts became discontinued, it shall be sufficient to make search for him for the required period of search in the famous places where people mostly travel. If, however, he had travelled to a definite city in any country, like an Iraqi travelling to Khorāsān, it is sufficient to make search in the town and places of stay lying on the way up to that city and then in that city itself. He shall not be searched in places lying at a distance from the route, let alone the cities lying around that country.

الواقعة في أطراف المملكة، و إذا خرج من منزله مريداً للسفر أو هــرب و لايدري الى أين توجه و انقطع أثره تفحص عنه مدة التربص في الأطراف و الجوانب مما يحتمل قريباً وصوله إليه، ولا ينظر إلى ما بعد احتماله.

مسألة ١٨ ـ قد عرفت أن الأحوط أن يكون الفحص و الطلاق بعد رفع أمرها إلى الحاكم، فلو لم يمكن الوصول إليه فان كان له و كيل و مأذون في التصدي للأمور الحسبية فلا يبعد قيامه مقامه في هذا الأمر، و مع فقده أيضاً فقيام عدول المؤمنين مقامه محل إشكال.

مسألة ١٩ ـ إن علم أن الفحص لا ينفع و لا يترتب عليه أثر فالظاهر سقوط وجوبه، و كذا لو حصل اليأس من الاطلاع عليه في أثناء المدة، فيكفي مضي المدة في جواز الطلاق و الزواج.

مسألة ٢٠ ـ يجوز لها اختيار البقاء على الزوجية بعد رفع الأمر إلى الحاكم قبل أن تطلق ولو بعد الفحص و انقضاء الأجل، و لها أن تعدل عن اختيار البقاء إلى اختيار الطلاق، و حينئذ لا يلزم تجديد ضرب الأجل و الفحص.

مسألة ٢١ ـ الظاهر أن العدة الواقعة بعد الطلاق عدة طلاق و إن كانت بقدر عدة الوفاة، و يكون الطلاق رجعياً، فتستحق النفقة في أيامها و إن ماتت فيها يرثها لو كان في الواقع حياً، و إن تبيّن موته فيها ترثه، و ليس عليها حداد بعد الطلاق.

مسألة ٢٢ ـ إن تبين موته قبل انقضاء المدة أو بعده قبل الطلاق وجب عليها عدة الوفاة، و إن تبين بعد انقضاء العدة اكتفي بها، سواء كان التبيّن قبل التزويج أو بعده، و سواء كان موته المتبين وقع قبل العدة أو بعدها أو في أثنائها أو بعد التزويج، و أما لوتبين موته في أثناء العدة فهل يكتفى باتمامها أو تستأنف عدة الوفاة من حين التبين؟ و جهان بل قولان أحوطهما الثاني لو لم يكن الأقوى.

مسألة ٢٣ ـ لو جاء الزوج بعد الفحص و انقضاء الأجل فان كان قبل الطلاق فهي زوجته، و إن كان بعد ما تزوجت بالغير فلا سبيل له عليها، و إن

If he has left his house with the intention of going on a journey, or has escaped, but it is not known to which place, and his connection is discontinued, a search shall be carried out for him during the required period of search in and about the directions where there is a close probability of his arrival, but in places where there is a distant possibility of his reach.

Problem # 18. It is understood that it is more cautious that the search and divorce must be after the reference of the case to a judge, but if it not possible to have access to him, then if he has some agent allowed to manage his day to day matters, it shall not be far from likely to let him officiate in place of the missing person. In case of his failure, here is hesitation in the appointment of believers of sound character in his place.

Problem # 19. If it is known that the search shall of no avail, and it shall give no positive result, then apparently its obligation shall drop. The same shall be the case if the net result of the search is despair of getting any information about the missing in the middle of the period, then it shall be sufficient to wait until the expiry of the required period of search for the permissibility of the divorce to his wife and her marriage [to another husband].

Problem # 20. The woman is allowed to continue to be in the wedlock of the missing husband after referring her case to the judge before she is divorced even after the completion of the search and expiry of its period. She shall also be allowed to opt for divorce after once opting to continue to remain the wedlock of the missing person. In such case there shall no obligation for fixing the period and carry out search [for the missing person].

Problem # 21. Apparently the *'Iddah* after the divorce [to the wife of the missing husband] shall be an *'Iddah* for divorce, even if it is equal to one in the even of the husband's death, and the divorce shall be revocable, in the sense that she shall be entitled to maintenance during the currency of her *'Iddah*. If in the meantime she dies, the husband shall be entitled to inherit her if he were in fact alive. If, in the meantime, it transpires that the man is dead, she shall succeed him, but she shall not be bound to observe *Ḥidād* after the divorce.

Problem # 22. If the death of the missing husband comes to light before the expiry of the required period of waiting or after it but before divorce, the wife [of the missing husband] shall be bound to observe *'Iddah*. If his death comes to light after the completion of the *'Iddah*, she shall suffice with it, whether it comes to light before or after her marriage [to another man], irrespective of the death coming to light has taken place before or after the *'Iddah*, or during its currency or after her marriage [to another man]. If, however, the death of the missing husband comes to light during the currency of the *'Iddah* ,then will she be required to complete that *'Iddah* or to start *'Iddah* for the husband's death anew, thee are two alternatives, rather two opinions, the more cautious being in favour of the latter, even if it is not the stronger opinion.

Problem # 23. If the husband comes after the completion of the search and expiry of the required period of waiting, then if it was before her divorce, she would be his wife [as before], but if it was after

كان في أثناء العدة فله الرجوع إليها كما أن له إبقاءها على حالها حتى تنقضي عدتها وتبين عنه، و أما إن كان بعد انقضاء العدة و قبل التزويج ففي جواز رجوعها إليها وعدمه قولان، أقواهما الثاني.

مسألة ٢٤ ـ لو حصل لزوجة الغائب بسبب القرائن و تراكم الأمارات العلم بموته جاز لها بينها و بين الله أن تتزوج بعد العدة من دون حاجة إلى مراجعة الحاكم، و ليس لأحد عليها اعتراض ما لم يعلم كذبها في دعوى العلم نعم في جواز الاكتفاء بقولها و اعتقادها لمن أراد تزويجها و كذا لمن يصير و كيلاً عنها في إيقاع العقد عليها إشكال، و الأحوط لها أن تتزوج ممن لم يطلع بالحال و لم يدر أن زوجها قد فقد و لم يكن في البين إلا دعواها بأن زوجها مات، بل يقدم على تزويجها مستنداً الى دعواها أنها خلية بلا مانع، و كذا توكل من كان كذلك.

القول في عدة وطء الشبهة

و المراد به وطء الأجنبية بشبهة أنها حليلته إما لشبهة في الموضوع كما لو وطأ مرأة باعتقاد أنها زوجته أو لشبهة في الحكم كما إذا عقد على أخت الموطوء معتقداً صحته و دخل بها.

مسألة ١ ـ لا عدة على المزنيّ بها سواء حملت من الزنا أم لا على الأقوى، و أما الموطوءة شبهة فعليها عدة سواء كانت ذات بعل أو خلية ، و سواء كانت لشبهة من الطرفين أو من طرف الواطىء، بل الأحوط لزومها إن كانت من طرف الموطوءة خاصة.

مسألة ٢ ـ عدة وطء الشبهة كعدة الطلاق بالأقراء و الشهور و بوضع الحمل لو حملت من هذا الوطء على التفصيل المتقدم، و من لم يكن عليها عدة الطلاق كالصغيرة و اليائسة ليس عليها هذه العدة أيضاً.

مسألة ٣ ـ لو كانت الموطوءة شبهة ذات بعل لايجوز لزوجها وطوءها في مدة

her marriage with another man, he would have no access to her. If it was during the currency of her *'Iddah*, he shall be entitled to recall her, as he would be entitled to let her continue in her position [as his wife] until the expiry of the *'Iddah*, after which she would be separated from him. If, however, he comes back after the expiry of the *'Iddah*, but before her marriage [to another man], then as to the permissibility of his recalling her or its absence, there are two opinions, the stronger being in favour of the latter.

Problem # 24. If the wife of a missing person obtains knowledge about his death through circumstances and accumulation of indications, it shall be permissible for her to marry after the *'Iddah*, without the obligation of referring her case to the judge, the matter being between her and Allāh, no one shall have the right to object unless he has a knowledge about the falsehood of her claim. Of course, there is hesitation in the permissibility of the sufficiency of her word and belief for the person intending to marry her, and so for the person becomes her agent in contracting her marriage on her behalf. It is more cautious for her to contract marriage with some one who does not have knowledge about her position and does not know that her husband has gone missing, and thee is nothing except her claim that her husband has died, and is resorting to marry on the authority of her claim that she is duly released without there being any obstacle [in her way to remarry]. In like manner she should appoint one who should act as her agent.

III – Laws relating to *'Iddah* for Intercourse under a Semblance of Right

An intercourse under a semblance of right means an intercourse performed with a stranger woman under the impression that she is lawful to her either due to the suspicion about the subject as when he copulates with a woman believing her to be his wife or under the suspicion about the law as when he contracts marriage with the sister of one with whom he had had an unnatural act considering the contract to be lawful and consummates with her.

Problem # 1. A woman subjected to an illicit intercourse is not required to observe *'Iddah*, irrespective of her become pregnant by the illicit intercourse or not, according to the stronger opinion. However, a woman who has been subjected to an intercourse under a semblance of right is bound to observe *'Iddah* irrespective of her having a husband or otherwise, and whether both the parties were labouring under suspicion, or it was only the man performing intercourse who was labouring under suspicion. Rather to be cautious it is necessary if it was exclusively the party subjected to the intercourse who was labouring under suspicion.

Problem # 2. The *'Iddah* for an intercourse under a semblance of right is equal to the *'Iddah* for divorce to be observed by *Qur's*, or months, or by the delivery of the foetus if she conceives as a result of such intercourse, as already explained in detail. A woman who is not bound to observe *'Iddah* for divorce like a minor or one who is past child-bearing age shall also not be required to observe *'Iddah* in case of an intercourse under a semblance of right.

Problem # 3. If the woman subjected to an intercourse under a semblance of right has a husband, it shall not be lawful for him to have intercourse with her during the currency of her *'Iddah*. Whether he is

عدتها، و هل يجوز له سائر الاستمتاعات منها أم لا؟ أحوطها الثاني و أقواهما الأول، و الظاهر أنه لا تسقط نفقتها في أيام العدة و ان قلنا بحرمة جميع الاستمتاعات منها.

مسألة ٤ ـ إذا كانت خلية يجوز لواطئها أن يتزوج بها في زمن عدتها بخلاف غيره، فانه لايجوزله ذلك على الأقوى.

مسألة ٥ ـ لا فرق في حكم وطء الشبهة من حيث العدة و غيرها بين أن يكون مجرداً عن العقد أو يكون بعده بأن وطىء المعقود عليها بشبهة صحة العقد مع فساده واقعاً.

مسألة ٦ ـ لو كانت معتدة بعدة الطلاق أو الوفاة فوطئت شبهة أو وطئت ثم طلقها أو مات عنها زوجها فعليها عدتان على الأحوط لو لم يكن الأقوى، فان كانت حاملاً من أحدهما تقدمت عدة الحمل، فبعد وضعه تستأنف العدة الأخرى أو تستكمل الأولى، و إن كانت حائلاً يقدم الأسبق منهما، و بعد تمامها استقبلت العدة الأخرى من الآخر.

مسألة ٧ ـ لو طلق زوجته بائناً ثم وطأها شبهة اعتدت عدة أخرى على الأحوط بالتفصيل المتقدم في المسألة السابقة.

مسألة ٨ ـ الموجب للعدة أمور: الوفاة و الطلاق بأقسامه، والفسخ بالعيوب، و الانفساخ بمثل الارتداد أو الاسلام أو الرضاع، و الوطء بالشبهة مجرداً عن العقد أو معه. و انقضاء المدة أو هبتها في المتعة، و يشترط في الجميع كونها مدخولاً بها إلا الأول.

مسألة ٩ ـ لو طلقها رجعياً بعد الدخول ثم رجع ثم طلقها قبل الدخول لايجري عليه حكم الطلاق قبل الدخول حتى لايحتاج إلى العدة، من غير فرق بين كون الطلاق الثاني رجعياً أو بائناً، و كذا الحال لو طلقها بائناً ثم جدد نكاحها في أثناء العدة ثم طلقها قبل الدخول لايجري عليها حكم الطلاق قبل الدخول، و كذا الحال فيما إذا عقد عليها منقطعاً ثم وهب مدتها. بعدالدخول ثم تزوجها ثم

allowed to have other enjoyments with her or not, the more cautious shall be the latter, while the stronger would be the former. Apparently she is not deprived of her right to maintenance during the period of her *'Iddah*, even if we declare all enjcyments with her to be prohibited.

Problem # 4. If the woman subjected to the intercourse under a semblance of right has no husband, the person who has had intercourse with her shall be allowed to marry her, unlike any man other than him who is not allowed to marry her, according to the stronger opinion.

Problem # 5. There is no difference in the law relating to the intercourse under a semblance of right as regards her *'Iddah*, etc., whether it is without a contract or after it as when a man performs intercourse with a woman with whom he has contracted marriage under the impression that the contract is valid while in fact is invalid.

Problem # 6. If a woman observing an *'Iddah* for divorce or her husband's death is subjected to an intercourse under a semblance of right, or the husband copulates with her and then divorces her, or her husband dies, she shall be required to observe two *'Iddahs*, according to the more cautious, if not stronger, opinion. If she conceives as a result of either of the intercourses, she shall first observe the *'Iddah* for pregnancy, so that after the delivery she shall start the other *'Iddah*, or complete the first. If she is not pregnant, the first *'Iddah* shall precede, and after its completion, she shall start the *'Iddah* for the second.

Problem # 7. If a man divorces his wife irrevocably, and then has intercourse with her under a semblance of right, she shall observe the second *'Iddah*, according to the detail given in the preceding Problem, according to the more cautious opinion.

Problem # 8. Following are the causes for the observation of 'Iddah: [Husband's] death, a divorce with its virus kinds, a dissolution of marriage due to blemishes, or automatic dissolution as a result of apostasy, conversion to Islam or fosterage, intercourse under a semblance of right without a contract of marriage or with it, expiry or excuse of the period of a temporary marriage, the condition in all of them except the first being that the wife must be one with whom the husband has copulated.

Problem # 9. If a husband divorces his wife revocably after consummation, then recalls her, then divorces her before consummation, the law relating to the divorce before consummation shall not apply to her so that she may not be required to observe *'Iddah*, irrespective of the second divorce being revocable or irrevocable. The same shall be the case if he divorces her irrevocably, and then marries her afresh during the currency of her *'Iddah*, then divorces her before consummation, the law relating to divorce before consummation shall not apply to her. The same shall be the case if a man marries a woman temporarily, then excuses her remaining period after consummation, and then marries her, and

طلقها قبل الدخول، فتوهم جواز الاحتيال بنكاح جماعة في يوم واحد امرأة شابة ذات عدة بما ذكر في غاية الفساد.

مسألة ١٠ ـ المطلقة بالطلاق الرجعي بحكم الزوجة في الأحكام، فما لم يدل دليل على الاستثناء يترتب عليها حكمها ما دامت في العدة من استحقاق النفقة و السكنى و الكسوة إذا لم تكن ولم تصر ناشزة، و من التوارث بينهما، و عدم جواز نكاح أختها والخامسة، و كون كفنها و فطرتها عليه، وأما البائنة كالمختلعة و المباراة و المطلقة ثلاثاً فلا يترتب عليها آثار الزوجية مطلقاً لا في العدة و لا بعدها، نعم لو كانت حاملاً من زوجها استحقت النفقة و الكسوة و السكنى عليه حتى تضع حملها كمامر.

مسألة ١١ ـ لو طلقها مريضاً ترثه الزوجة ما بين الطلاق و بين سنة بمعنى أنه إن مات الزوج بعد ما طلقها في حال المرض بالمرض المزبور لا بسبب آخر على الأقرب، فان كان موته بعد سنة من حين الطلاق و لو يوماً أو أقل لا ترثه، و إن كان بمقدار سنة و ما دونها ترثه سواء كان الطلاق رجعياً أو بائناً، و ذلك بشروط ثلاثة: الأول ـ أن لا تتزوج المرأة، فلو تزوجت بعد انقضاء عدتها ثم مات الزوج لم ترثه، الثاني ـ أن لا يبرأ من المرض الذي طلقها فيه. فلو برأ منه ثم مرض و مات في أثناء السنة لم ترثه إلا إذا مات في أثناء العدة الرجعية. الثالث ـ أن لا يكون الطلاق بالتماس منها، فلا ترث المختلعة و المباراة، لأن الطلاق بالتماسهما.

مسألة ١٢ ـ لا يجوز لمن طلق رجعياً أن يخرج المطلقة من بيته حتى تنقضي عدتها إلا أن تأتي بفاحشة توجب الحد أو تأتي بما يوجب النشوز، و أما مطلق المعصية فلا توجب جواز إخراجها، و أما البذاء باللسان و إيذاء الأهل إذا لم ينته إلى النشوز ففي كونه موجباً له إشكال و تأمل، ولا يبعد أن يكون ما يوجب الحد موجباً لسقوط حقها مطلقاً، و ما يوجب النشوز موجباً لسقوطه مادام بقائها عليه، و اذا رجعت رجع حقها، و كذا لا يجوز لها الخروج بدون إذن زوجها إلا لضرورة أو أداء واجب مضيق.

again divorces her before consummation. The idea of permissibility of marriage of a group of persons in a single day with a young woman who is within the age requiring *'Iddah* is a source of corruption as mentioned in this Problem.

Problem # 10. A woman divorced revocably is like a wife as regards the laws applicable to her. So as long as thee is no argument in favour of her exemption, the laws of a wife shall be applicable to her as long as she is observing *'Iddah* as regards her entitlement to maintenance, lodging and clothing, when she is not persistently contumacious, and also as regards their mutual right of inheritance, impermissibility of marriage with her sister and marriage with a fifth wife, and the liability of the expenditure on her burial and payment of her *Fiṭrah* on the husband. As regards an irrevocably divorced woman like one divorced by way of a *Khul'* or *Mubārāt* divorce or one divorced thrice, she does not enjoy the benefits of a wife absolutely during or after an *'Iddah*. Of course, if she is pregnant by her husband, she shall be entitled to maintenance, clothing and lodging, until her delivery of the child, as already mentioned.

Problem # 11. If a husband divorces his wife in the sick-bed, the wife shall be entitled to inherit him until a year after the divorce, in the sense that if the husband divorces his wife while in the sick-bed and dies in the same sickness and not due to any other cause, according to the opinion closer to the traditional authority, if his death has occurred after a year since the divorce even for a day or less than that, she would not have any share in his inheritance, but if it were within a year or less, she shall have her share in his inheritance, irrespective of the divorce being revocable or irrevocable.

This law shall apply on three conditions. Firstly, that the wife should not have married another husband, so that if she has married another husband after the expiry of her *'Iddah*, and then her husband dies, she shall not be entitled to inheritance from him. Secondly, the husband should not have recovered from the sickness during which he had divorced her, so that if he had recovered from the sickness and then fell ill again, and died within a year since the divorce, she shall not receive any inheritance from him, except when he had died during the currency of *Iddah* for a revocable divorce. Thirdly, that the divorce should not have been as a result of her demand, so that a woman divorced by way of a *Khul'* or *Mubārāt* shall have no share in his inheritance, as in both these cases, the divorce had been given on her demand.

Problem # 12. It is not lawful for a man divorcing his wife revocably to drive her out of his house until the termination of her *'Iddah*, except when she commits an atrocious deed entailing the obligatory punishment by *Ḥadd* or commits *Nushūz* , or contumacy, but the commission of a simple sin shall not justify her expulsion from the house.

As regards the use of foul language or hurting the family [members], as long as it does not amount to contumacy, there shall be hesitation in justifying her expulsion from the husband's house. An offence that is punishable by *Ḥadd* is not far from causing deprivation from her right absolutely, or what leads to the punishment for contumacy may deprive her of her right as long she persists to be contumacious, so that when she desists from it, her entitlement to the right shall also recover. Likewise,

القول في الرجعة

وهي رد المطلقة في زمان عدتها الى نكاحها السابق، ولا رجعة في البائنة و لا في الرجعية بعد انقضاء عدتها.

مسألة ١ ـ الرجعة إما بالقول، و هو كل لفظ دل على إنشاء الرجوع كقوله: «راجعتك الى نكاحي» و نحوه، أو دل على التمسك بزوجيتها كقوله: «رددتك الى نكاحي» أو «أمسكتك في نكاحي» و يجوز في الجميع إسقاط قوله «الى نكاحي» و «في نكاحي» ولا يعتبر فيه العربية، بل يقع بكل لغة اذا أفاد المعنى المقصود، و إما بالفعل بأن يفعل بهاما لا يحل إلا للزوج بحليلته، كالوطء و التقبيل و اللمس بشهوة أو بدونها.

مسألة ٢ ـ لا تتوقف حلية الوطء و ما دونه من التقبيل و اللمس على سبق الرجوع لفظاً و لا على قصد الرجوع به، لأن الرجعية بحكم الزوجة، و هل يعتبر في كونه رجوعاً أن يقصد به الرجوع؟ قولان، أقواهما العدم، و لو قصد عدم الرجوع و عدم التمسك بالزوجية ففي كونه رجوعاً تأمل، نعم في خصوص الغشيان غير بعيد، ولا عبرة بفعل الغافل و الساهي و النائم مما لا قصد فيه للفعل، كما لا عبرة بالفعل المقصود به غير المطلقة كما لو واقعها باعتقاد أنها غيرها.

مسألة ٣ ـ لو أنكر أصل الطلاق وهي في العدة كان ذلك رجوعاً و ان علم كذبه.

مسألة ٤ ـ لا يعتبر الاشهاد في الرجعة و ان استحب دفعاً لوقوع التخاصم و النزاع، و كذا لا يعتبر فيها اطلاع الزوجة عليها، فان راجعها من دون اطلاع أحد صحت واقعاً، لكن لو ادعاها بعد انقضاء العدة و لم تصدقه الزوجة لم تسمع دعواه، غاية الأمر له عليها يمين نفي العلم لو ادعى عليها العلم، كما أنه لو أدعى الرجوع الفعلي كالوطء و أنكرته كان القول قولها بيمينها لكن على البت لا على

she is not allowed to leave the husband's house without the permission of the husband except for the fulfilment of a necessity or a pressing obligation.

IV – Laws relating to *Raj'ah* or a Recall

Raj'ah or a Recall is the return of the divorced woman during the period of her *'Iddah* to her former position of wedlock. A recall is allowed neither in an irrevocable divorce, nor is it allowed after the termination of the *Iddah* in a revocable divorce.

Problem # 1. A Recall may take place either in words, indicating the intention of recalling the divorced wife, as by saying [to her]: "I have recalled you to my wedlock," or indicating the continuance of her marital status, as by saying [to her]: "I have returned to my wedlock," or "I have sustained you in my wedlock." It is permissible in all these formulas to omit the last words of "to my wedlock" or "in my wedlock'.

It is not a condition to express these words in Arabic, but they can be expressed in any languages carrying the intended meanings. Or it may take place by deed, as when he does something that is not lawful but for the husband with a lawful wife, as performance of intercourse or kissing or touching lasciviously or otherwise.

Problem # 2. The lawfulness of the intercourse or the other acts like kissing or touching [lasciviously] does not depend on the precedence of recall by words or on the intention of recall, as a revocably divorced woman is like one's wife. Whether it is a condition for its being a recall that there must be an intention to recall the wife, there are two opinions on this point, the stronger being in favour of its absence. If, however, he intends not to recall the wife or sustain her in her status of a wife, then there is hesitation in treating such deeds as recall, though it is not far from likelihood to treat sexual intercourse as recall. There is no legal value for an act of one doing something in ignorance, by mistake or while asleep, as there is no intention for the act in such conditions, as also there is no legal value for an act intended to be performed with a woman other that the divorced woman, as when the husband copulates with her taking her to be some one else.

Problem # 3. If the husband denies the divorce itself, while the wife is observing *'Iddah*, it shall be called a recall, even if there is certainty as to its being false.

Problem # 4. There is no condition of witnesses in a recall, though it is approved in order to avoid enmity and dispute. Likewise, informing the wife is also not a condition in it. If the husband recalls his wife without informing any one, the recall shall be valid in fact. If, however, he claims after the

نفي العلم.

مسألة ٥ ـ لو اتفقا على الرجوع و انقضاء العدة واختلفا في المتقدم منهما فادعى الزوج أن المتقدم الرجوع و ادعت هي أنه انقضاؤها فان تعين زمان الانقضاء و ادعى الزوج أن رجوعه كان قبله و ادعت هي أنه بعده فالأقرب أن القول قولها بيمينها، و ان كان بالعكس بأن تعين زمان الرجوع دون الانقضاء فالقول قوله بيمينه.

مسألة ٦ ـ لو طلق و راجع فأنكرت الدخول بها قبل الطلاق لئلا تكون عليها العدة و لا تكون له الرجعة و ادعى الدخول فالقول قولها بيمينها.

مسألة ٧ ـ الظاهر أن جواز الرجوع في الطلاق الرجعي حكم شرعي غير قابل للاسقاط، و ليس حقاً قابلاً له كالخيار في البيع الخياري، فلو أسقطه لم يسقط، و له الرجوع، و كذلك اذا صالح عنه بعوض أو بغير عوض.

termination of the *'Iddah* to have recalled her, but the wife does not confirm it, his claim shall not be entertained. At the most the husband may demand her to take oath about her lack of knowledge in case he claims that she had knowledge about it, in the same way as when he claims to have recalled her by deed like performance of intercourse, but she denies it, in which case her word shall carry provided it is followed by her oath, that should be based on certainty and not on lack of knowledge.

Problem # 5. If both the spouses agree on the recall and termination of *'Iddah*,but they differ on which of them was earlier, when the husband claims the recall to be precedent, while the wife claiming the termination of the *'Iddah* being precedent to recall, Then if the time of the termination of the *'Iddah* is specified, and the husband claims that the recall was prior to it, while she claims that it was after it. then according to the opinion closer to the traditional authority, her word shall be entertained if followed by her oath. If, it were vice versa, so that the time of the recall was specified and not of the termination of the *'Iddah*, then the husband's word shall carry provided it is followed by his oath.

Problem # 6. If the husband divorces his wife and then recalls her, but she denies the performance of intercourse by him before the divorce so that she may not be required to observe *'Iddah* and he may not be entitled to recall her, while the husband claims to have performed intercourse [before the divorce], then her word shall be entertained if followed by her oath.

Problem # 7. Apparently the permissibility of recall in a revocable divorce is a legal provision that cannot be dropped, and is not a right as the right of option in an optional sale. So if he wants to drop it, cannot be dropped, and his right to recall her shall remain intact. The same shall be the law if the husband reaches a compromise on it with or without a ransom.

كتاب الخلع والمباراة

مسألة ١ ـ الخلع هو الطلاق بفدية من الزوجة الكارهة لزوجها فهو قسم من الطلاق يعتبر فيه جميع شروطه المتقدمة، و يزيد عليها بأنه يعتبر فيه كراهة الزوجة لزوجها خاصة، فان كانت الكراهة من الطرفين فهو مباراة، و ان كانت من طرف الزوج خاصة لم يكن خلعاً و لا مباراة.

مسألة ٢ ـ الظاهر وقوع الخلع بكل من لفظي الخلع والطلاق مجرداً كل منهما عن الآخر أومنضماً، فبعد ما أنشأت الزوجة بذل الفدية ليخلعها الزوج يجوز أن يقول: «خلعتك على كذا» أو «أنت مختلعة على كذا» و يكتفي به أو يتبعه بقوله: «فأنت طالق على كذا» أو يقول: «أنت طالق على كذا» و يكتفي به أو يتبعه بقوله: «فأنت مختلعة على كذا» لكن لا ينبغي ترك الاحتياط بالجمع بينهما بل لا يترك .

مسألة ٣ ـ الخلع من الايقاعات لكن يشبه العقود في الاحتياج إلى طرفين و إنشاءين: بذل شيء من طرف الزوجة ليطلقها الزوج و إنشاء الطلاق من طرفه بما بذلت، و يقع ذلك على نحوين: الأول ـ أن يقدم البذل من طرفها على أن يطلقها فيطلقها على ما بذلت. الثاني ـ أن يبتدىء الزوج بالطلاق مصرحاً بذكر العوض فتقبل الزوجة بعده، و لا ينبغي ترك الاحتياط بايقاعه على النحو الأول.

SECTION FORTY

KHUL' AND *MUBĀRĀT*

Problem # 1. *Khul'* is a divorce given to a reluctant wife against payment o. ransom. So it is a kind of divorce to which all the conditions of divorce mentioned earlier apply, with the addition that there must be an aversion on the part of the wife towards the husband.

If, however, the aversion is found in both the spouses, it shall be *Mubārāt*.

If the aversion was on the part of the husband alone, it shall neither be a *Khul'* nor a *Mubārāt*.

[I - Laws relating to *Khul'*]

Problem # 2. Apparently a *Khul'* takes place with both the words of *Khul'* and *Ṭalāq*, or divorce, whether they are pronounced separately or together. So after the wife has initiated the payment of ransom so that the husband may release her, it shall be permissible for the husband to say [to the wife]: "I have released you against the payment of so much," or "You are released against the payment of so much,", and that is enough, or it may be followed by saying: "So you are divorced against the payment of so much,", or he may say [to the wife]: "You are divorced against the payment of so much", and that is enough, or it may be followed by saying [to the wife]: "So you are released," though caution must not be given up by adding both; rather, it should not be given up.

Problem # 3. *Khul'* is, in fact, one of the *Īqā'āt*, or unilateral operations, but it resembles contracts as it requires two parties and two initiations, one relating to the payment of a ransom by the wife so that the husband may divorce her, and the other relating to the divorce on his part against the ransom paid by her.

It takes place in the following two ways. Firstly, the wife takes the initiative in offering the ransom to the husband so that he may divorce her against what she has paid. Secondly, the husband takes the initiative by divorcing her expressly mentioning the ransom and the wife accepts it subsequently, though caution must not be given up by resorting to the unilateral operation in the first manner.

مسألة ٤ ـ يعتبر في صحة الخلع عدم الفصل بين إنشاء البذل و الطلاق بما يخل بالفورية العرفية، فلو أخل بها بطل الخلع و لم يستحق الزوج العوض، لكن إذا أوقعه بلفظ الطلاق أو اتبعه بذلك وقع الطلاق رجعياً مع فرض اجتماع شرائطه، و إلا كان بائناً.

مسألة ٥ ـ يجوز أن يكون البذل و الطلاق بمباشرة الزوجين أو بتوكيلهما الغير أو بالاختلاف، و يجوز أن يوكّلا شخصاً واحداً ليبذل عنها و يطلق عنه، بل الظاهر أنه يجوز لكل منهما أن يوكّل الآخر فيما هو من طرفه، فيكون أصيلاً فيما يرجع إليه و وكيلا فيما يرجع إلى الطرف.

مسألة ٦ ـ يصح التوكيل من الزوج في الخلع في جميع ما يتعلق به من شرط العوض و تعيينه و قبضه و إيقاع الطلاق، و من المرأة في جميع مايتعلق بها من استدعاء الطلاق و تقدير العوض و تسليمه.

مسألة ٧ ـ لو وقع الخلع بمباشرة الزوجين فاما أن يبتدىء الزوجة و تقول: «بذلت لك ـ أو أعطيتك ـ ما عليك من المهر ـ أو الشيء الفلاني ـ لتطلقني» فيقول فوراً: «أنت طالق ـ أو مختلعة بكسر اللام ـ على ما بذلت ـ أو على ما أعطيت ـ» و إما أن يبتدىء الزوج فيقول: «أنت طالق ـ أو مختلعة ـ بكذا أو على كذا» فتقول فوراً: «قبلت» و إن وقع من وكيلين يقول وكيل الزوجة مخاطباً لوكيل الزوج: «عن قبل موكلتي فلانة بذلت لموكلك ما عليه من المهر ـ أو المبلغ الفلاني ليخلعها و يطلقها» فيقول وكيل الزوج فوراً: «زوجة موكلي طالق على ما بذلت» و قس على ما ذكر سائر الصور المتصورة، لكن لا ينبغي ترك الاحتياط المتقدم أي الجمع بين الصيغتين، بل لا يترك.

مسألة ٨ ـ لو استدعت الزوجة الطلاق بعوض معلوم فقالت له: «طلقني ـ أو اخلعني ـ بكذا» فيقول: «أنت طالق ـ أو مختلعة ـ بكذا» ففي وقوعه إشكال، فالأحوط اتباعه بالقبول منها بأن تقول بعد ذلك: «قبلت».

مسألة ٩ ـ يشترط في تحقق الخلع بذل الفداء عوضاً عن الطلاق، و يجوز

Problem # 4. It is a condition for the validity of a *Khul'*, that there should be no distance between the initiation of the ransom and the divorce that may disturb the normal immediacy, so that if the immediacy is disturbed, the *Khul'* shall be void, and the wife shall not be entitled to the return of the ransom. If, however, it is has taken place with the use of the word of *Ṭalāq*, or divorce, or it is followed by this word, a revocable divorce shall take place provided its conditions are fulfilled; otherwise, it shall be an irrevocable divorce.

Problem # 5. It is permissible for the payment of the ransom and the pronouncement of the divorce be exercised personally by the spouses or through agents or one personally and the other through an agent. It is also permissible that both should authorize a single person to make the payment of the ransom as well as the pronouncement of the divorce. Rather apparently it is also permissible for each of them to authorize the other to perform what is due on his/her part, so that he/she becomes the principal in what relates to himself/herself, and an agent in what relates to the other party.

Problem # 6. It is permissible for the husband to authorize an agent for the performance of all that relates to the condition of ransom, its determination and receipt as well as pronouncing the divorce. In like manner, it is permissible for the wife to authorize an agent for the performance of all that relates to her like asking the husband to divorce her, determination of the amount of ransom and its delivery.

Problem # 7. If the *Khul* 'divorce is performed personally by both the spouses, then either the wife may start by saying [to the husband]: "I have excused you from the payment of the dower you owe me, or so much so that you may divorce me," and immediately the husband must say: "You are divorced or released against what you have paid or what you have excused." Or the husband may take the initiative by saying [to the wife]: " You are divorced or released by so much or against the payment of so much," followed immediately by the wife saying: "I have accepted." If, however, it takes place through two agents, the wife's agent addressing the husband's agent says: "On behalf of my client such a one I have excused your client the dower owed by him or I have paid so much in order that he may release her and divorce her." Then the husband's agent must say immediately: "My client's wife is divorced against what you have paid." Similarly, there are other similar manners mentioned for it. But caution must not be given up by adding both the formulas; her, it should not be given up.

Problem # 8. If the wife asks the husband to divorce her against a specified ransom and says to him: "Dive or release me for so much'" and the husband says: "You are divorced or released for so much," then there shall be hesitation in its taking effect. So it is more cautious that the wife's acceptance must follow, so that after it she must say: "I have accepted."

Problem # 9. Payment of a ransom against divorce is a condition in *Khul'* , and the ransom may be in the form of anything that can be owned like a real estate, debt or usufruct, irrespective of its being large

الفداء بكل متمول من عين أو دين أو منفعة قلّ أو كثر و إن زاد على المهر المسمى، فان كان عيناً حاضرة تكفي فيها المشاهدة، و إن كان كليا في الذمة أو غائباً ذكر جنسه و وصفه و قدره، بل لا يبعد أن يكون الأمر فيه أوسع من ذلك، فيصح بما يؤول الى العلم كما لو بذلت ما في الصندوق مع العلم بكونه متمولاً. و يصح بما في ذمة الزوج من المهر و لو لم يعلما به فعلاً، بل في مثله ولو لم يعلما بعد أيضاً صح على الأقوى، و يصح جعل الفداء إرضاع ولده لكن مشروطاً بتعيين المدة، و لا تبعد صحته بمثل قدوم الحاج و بلوغ الثمرة. و إن جعل كليا في ذمتها يجوز جعله حالاً و مؤجلاً مع تعيين الأجل ولو بمثل ما ذكر.

مسألة ١٠ ـ يصح بذل الفداء منها و من وكيلها بأن يبذل وكالة عنها من مالها أو بمال في ذمتها. و هل يصح ممن يضمنه في ذمته باذنها فيرجع إليها بعد البذل بأن تقول لشخص: «اطلب من زوجي أن يطلقني بألف درهم مثلاً عليك و بعد مادفعتها إليه ارجع علي» ففعل ذلك و طلقها الزوج على ذلك؟ و جهان بل قولان، لا يخلو ثانيهما من رجحان، كما أنه لا يصح من المتبرع الذي لا يرجع عليها، فلو قالت الزوجة لزوجها: طلقني على دار زيد أو ألف في ذمته فطلقها على ذلك و قد أذن زيد أو أجاز بعده لم يصح الخلع و لا الطلاق الرجعي و لا غيره إلا إذا أوقع بلفظ الطلاق أو اتبعه بصيغته.

مسألة ١١ ـ لو قال أبوها: «طلقها و أنت بريء من صداقها» و كانت بالغة رشيدة فطلقها صح الطلاق و كان رجعياً بشرائطه و الشرط المتقدم في المسألة السابقة، و لم تبرأ ذمته بذلك ما لم تبرأ، و لم يلزم عليها الابراء ولا يضمنه الأب.

مسألة ١٢ ـ لو جعلت الفداء مال الغير أو ما لا يملكه المسلم كالخمر مع العلم بذلك بطل البذل فبطل الخلع و صار الطلاق رجعياً بالشرط المتقدم ولو جعلته مال الغير مع الجهل بالحال فالمشهور صحة الخلع و ضمانها للمثل أو القيمة، وفيه تأمل.

مسألة ١٣ ـ يشترط في الخلع على الأحوط أن تكون كراهة الزوجة شديدة

or small, even if it more than the specified dower. If it is present in substance, it is sufficient to see it. In case it is something owed by some one or is not present, its kind, description and amount must be mentioned. Rather the matter may be of a more extensive nature than that. So it is proper to give something that may be in the knowledge of some one, as when the woman pays as ransom what lies in a box with the knowledge that it is something that can be owned. It is also valid to make the dower owed by the husband as the ransom, even if both of them may not be knowing [its amount] presently, or determining its substitute if its amount is not know even later shall be valid, according to the stronger opinion. It is also lawful to make suckling of the husband's child ransom with the condition of specifying its period. It is also not far from its validity if the time [for suckling] is specified as the arrival of the pilgrims or ripening of the fruits. If it is made a total liability of the wife, it is permissible to make it prompt or deferred with the specification of its period, even it is similar to what we have mentioned.

Problem # 10. It is valid if the ransom is paid by her or by her agent so that the latter pays it on behalf of her out of her property or out of what is owed by her. Is it is valid if it is paid by a person who accepts its liability with her permission so that he may have recourse to her after payment, as when she says to a person: "Ask my husband to divorce me against the payment of, suppose, one thousand Dirhams, and after having paid it to him receive it from me, " and the man does so, and the husband divorces her against that payment, there are two alternatives, rather two opinions on this point, the second one is not devoid of preference, as it is not valid if it is paid by a person voluntarily and also does not have a recourse to her for its payment. So if the wife says to her husband: "Divorce me against Zayd's house, or one thousand owed by him," and he divorces her, and subsequently Zayd consents to it or gives permission, neither the *Khul'* shall be valid nor shall it be a revocable or other divorce, except when it is executed by the word of *Ṭalāq*, or divorce, or its formula is followed by the formula of divorce.

Problem # 11. If the father of a woman says to her husband: "Divorce her and you are free from payment of her dower," while the woman was adult and discreet. So the husband divorces her. The divorce shall be valid, but it shall be a revocable divorce with all its condition along with the condition mentioned in the preceding Problem, and he shall not be exonerated from the payment of her dower as long as she does not exonerate her. Neither it shall be binding on her to exonerate him nor shall the father be liable for it.

Problem # 12. If a woman makes the property of another her ransom or something that is not owned by a Muslim like wine despite its knowledge, he ransom shall be void and so shall be the *Khul'* ,by turning into a revocable divorce on the condition mentioned above. If she makes the property of another her ransom due to her ignorance of the position, then according to the prevalent opinion the *Khul'* shall be valid, and she shall be liable for the payment of its substitute or its price, but there is hesitation [in accepting this opinion].

Problem # 13. According to the more cautious opinion, it is a condition in *Khul'* that there must be strong aversion on the part of the wife due to which it may be apprehended from her words or deeds, etc., that she would leave obedience to the husband and enter [the domain of] insubordination.

بحيث يخاف من قولها أو فعلها أو غيرهما الخروج عن الطاعة و الدخول في المعصية.

مسألة ١٤ ـ الظاهر أنه لا فرق بين أن تكون الكراهة المشترطة في الخلع ذاتية ناشئة من خصوصيات الزوج كقبح منظره و سوء خلقه و فقره و غير ذلك و بين أن تكون ناشئة من بعض العوارض مثل وجود الضرّة و عدم إيفاء الزوج بعض الحقوق الواجبة أو المستحبة، نعم إن كانت الكراهة و طلب المفارقة من جهة إيذاء الزوج لها بالسب و الشتم والضرب و نحوها فتريد تخليص نفسها منها فبذلت شيئاً ليطلقها فطلقها لم يتحقق الخلع، و حرم عليه ما أخذه منها، و لكن الطلاق صح رجعيا بالشرط المتقدم.

مسألة ١٥ ـ لو طلقها بعوض مع عدم الكراهة و كون الأخلاق ملتئمة لم يصح الخلع و لم يملك العوض و لكن صح الطلاق بالشرط المتقدم، فان كان مورده الرجعي كان رجعياً و إلا بائناً.

مسألة ١٦ ـ طلاق الخلع بائن لا يقع فيه الرجوع ما لم ترجع المرأة فيما بذلت، و لها الرجوع فيه ما دامت في العدة، فاذا رجعت كان له الرجوع إليها.

مسألة ١٧ ـ الظاهر اشتراط جواز رجوعها في المبذول بامكان رجوعه بعد رجوعها، فلو لم يمكن كالمطلقة ثلاثاً و كما إذا كانت ممن ليست لها عدة كاليائسة و غير المدخول بها لم يكن لها الرجوع في البذل، بل لايبعد عدم صحة رجوعها فيه مع فرض عدم علمه بذلك إلى انقضاء محل رجوعه فلو رجعت عند نفسها ولم يطلع عليه الزوج حتى انقضت العدة فلا أثر لرجوعها.

مسألة ١٨ ـ المباراة قسم من الطلاق، فيعتبر فيه جميع شروطه المتقدمة و يعتبر فيه ما يشترط في الخلع من الفدية و الكراهة، فهي كالخلع طلاق بعوض ما تبذله المرأة، و تقع بلفظ الطلاق بأن يقول الزوج بعد مابذلت له شيئاً ليطلقها: «أنت طالق على ما بذلت» ولو قرنه بلفظ «بارأتك» كان الفراق بلفظ الطلاق من غير دخل للفظ «بارأتك» و لا يقع بقوله «بارأتك» مجرداً.

Problem # 14. Apparently there is no difference if the aversion conditional in a *Khul'* is personal emanating from the peculiarities of the husband like his ugly appearance, improper behaviour, poverty, etc. or when it is produced by some temporary factors like the existence of a co-wife or non-fulfilment of some of the obligatory or approved rights by the husband. Of course, if the aversion and the demand for separation were due to her torture by the husband by abusing her, or calling her names, beating her, or the like, and so she intends to release her from it, and has paid something so that he may divorce her, and he divorces her, it shall not be a *Khul'*, and whatever he has received from her shall be forbidden for him, but it shall be a valid revocable divorce on the condition mentioned before.

Problem # 15. If the man divorces her against payment of a ransom without any aversion, there being full agreement between them, it shall not be a valid *Khul'*, and he shall not entitled to own the ransom, but the divorce shall be valid on the condition mentioned before. So if it was a case of a revocable divorce, it shall be revocable, otherwise irrevocable.

Problem # 16. A *Khul'* divorce is an irrevocable divorce, that does not partake of a recall, unless the wife demands the return of whatever has been paid by her. She may demand the ransom back as long as the *'Iddah* subsists. When she withdraws her ransom, the husband shall be entitled to recall her.

Problem # 17. Apparently the condition for the permissibility of withdrawal of the ransom by the wife is due to the possibility of the husband's right to recall her after her withdrawal [of the ransom]. If it is not possible, as when the divorce being the third one, or when she is one of those who are not required to observe *'Iddah* as one who is past child-bearing age or one not consummated by the husband, she shall not be entitled to withdraw her ransom. Rather it is not far from declaring her withdrawal of her ransom in such case invalid with the supposition of lack of knowledge of the husband about her withdrawal until the termination of her *'Iddah* being the source of her withdrawal. So if she withdraws by herself without informing the husband until the expiry of her *'Iddah*, her withdrawal shall have no legal effect.

[II - Laws relating to *Mubārāt*]

Problem # 18. *Mubārāt* is also a kind of divorce. So all the conditions mentioned before are also applicable in it. So also the conditions applicable in case of *Khul'*, like ransom and aversion are also applicable in it. Like *Khul'*, it is also a divorce against payment of ransom by the wife. It takes effect with the use of the word of *Ṭalāq*, or divorce, when, after the wife has paid something to the husband so that he may divorce her, he says to her: "You are divorced against what you have paid." If he adds with it : "I have given you a *Mubārāt* divorce," the separation shall take place by the use of the word of divorce, without there being effect of the use of the words "I have given you a *Mubārāt* divorce," as it shall not be effected by merely saying : "I have given you a *Mubārāt* divorce."

مسألة ١٩ ـ تفارق المباراة الخلع بأمور: أحدها ـ أنها تترتب على كراهة كل من الزوجين لصاحبه، بخلاف الخلع فانه يترتب على كراهة الزوجة خاصة، ثانيها ـ أنه يشترط فيها أن لا تكون الفداء بأكثر من مهرها بل الأحوط أن يكون أقل منه بخلاف الخلع، فانه فيه على ما تراضيا، ثالثها ـ أنها لا تقع بلفظ «بارأتك» ولو جمع بينه و بين لفظ الطلاق يكون الفراق بالطلاق وحده، بخلاف الخلع فان الأحوط وقوعه بلفظ الخلع و الطلاق جمعاً كما مرّ.

مسألة ٢٠ ـ طلاق المباراة بائن ليس للزوج الرجوع فيه إلا أن ترجع الزوجة في الفدية قبل انقضاء العدة، فله الرجوع إليها حينئذ.

Problem # 19. There is difference between *Mubārāt* and *Khul'* in the following aspects.

Firstly, it takes place as a result of the aversion of both the spouses to each other, contrary to the *Khul'* that takes place due to the aversion of the wife particularly.

Secondly, it is a condition that the ransom should not exceed the amount of the wife's dower. Rather it is more cautious that it should be less than that, contrary to the case in *Khul'* in which it may as much as agreed upon by both the parties.

Thirdly, *Mubārāt* is not effected by the use of the words: "I have given you *Mubārāt* divorce," and if the word divorce is added to it, the separation takes place due to the use of the word "divorce" alone, contrary to *Khul'*, that, according to the more cautious opinion, takes place by the use of the words "*Khul'*" and divorce together, as mentioned before.

Problem # 20. A *Mubārāt* divorce is an irrevocable divorce in which the husband is not entitled to recall the wife, except when she withdraws her ransom before the termination of her *'Iddah*, in which case the husband has also the right to recall her.

كتاب الظهار

لذي كان طلاقاً في الجاهلية و موجباً للحرمة الأبدية، و قد غيّر شرع
ﻻم حكمه و جعله موجباً لتحريم الزوجة المظاهرة و لزوم الكفارة بالعود كما
ف تفصيله.

مسألة ١ ـ صيغة الظهار أن يقول الزوج مخاطباً للزوجة: «أنت علي كظهر
» أو يقول بدل أنت «هذه» مشيراً إليها أو «زوجتي» أو «فلانة» و يجوز
ل «عليّ» بقوله: «مني» أو «عندي» أو «لدي» بل الظاهر عدم اعتبار ذكر
ة «عليّ» و أشباهه أصلاً بأن يقول «أنت كظهر أمي» ولو شبهها بجزء آخر
أجزاء الأم غير الظهر كرأسها أو يدها أو بطنها ففي وقوع الظهار قولان،
وطها ذلك ، ولو قال: أنت كأمي أو أمي قاصداً به التحريم لاعلو المنزلة و
عظيم أو كبر السن و غير ذلك لم يقع و إن كان الأحوط وقوعه، بل لا يترك
حتياط.

مسألة ٢ ـ لو شبهها باحدى المحارم النسبية غير الأم كالبنت و الأخت فمع
كر الظهر بأن يقول مثلاً: «أنت عليّ كظهر أختي» يقع الظهار على الأقوى، و
دونه كما إذا قال: كأختي أو كرأس أختي لم يقع على إشكال.

مسألة ٣ ـ الموجب للتحريم ما كان من طرف الرجل، فلو قالت المرأة: أنت

SECTION FORTY-ONE

LAWS RELATING TO *ZIHĀR*

Ẓihār was a divorce and a cause for perpetual prohibition in the *Jāhiliyyah* (pre-Islamic period), but the Islamic Law has changed its laws, and it has made it a cause for the prohibition of the wife subjected to *Ẓihār*, and the obligation of expiation in case of reversion (of the position of legality), the details of which shall be know shortly.

Problem # 1. The prescribed formula (*Sīghah*) for *Ẓihār* is that the man, addressing his wife, should say: "*Anti 'alayya ka-ẓahri ummī* (You are to me like the back of my mother).", or instead of the word "*Anti* (You)" he should say "*Hādhihī* (This woman)" pointing towards his wife,or "*Zowjatī* (My wife)" , or "*Fulānatu* (Such a one)".

Instead of "'*alayya*" one may say: "'*indī*" or "*ladayya*". Rather apparently there is no condition for using "'*alayya*" or its similar words at all by saying: "*Anti ka-ẓahri ummī* (You are like the back of my mother)."

If the man likens (his wife) to the parts of his mother's body other than her back, as her head, hand or belly, then as to the *Ẓihār* taking place there are two opinions, the more cautious being in favour of its taking place.

If the man says: "You are like my mother," or "(You are) my mother," intending thereby to incur prohibition, and not the (mother's) elevated and great position, or big age, etc., *Ẓihār* shall not thereby take place, although, to be more cautious, it should take place; rather caution must not be given up.

Problem # 2. If a man likens [to his wife] one of his (female) relatives within the prohibited degrees of marriage other than the mother, such as the daughter or sister with the use of the word "back", as by saying (to his wife): "*Anti 'alayya ka-ẓahri ukhtī,*" *Ẓihār* shall thereby take place, according to the stronger opinion.

If, however, he does not use the word (back), as when he says: "*ka-ukhtī* (like my sister)," or "*ka-ra'si ukhtī* (like the head of my sister)," it shall not take place, though there is some hesitation in it.

Problem # 3. The prohibition takes effect when *Ẓihār* is made by the husband, so that if the wife says (to the husband): "*Anta 'alayya ka-ẓahri abī* or *akhī* (You are to me like the back of my father or my brother), *Ẓihār* shall not thereby be incurred.

علي كظهر أبي أو أخي لم يؤثر شيئاً.

مسألة ٤ ـ يشترط في الظهار وقوعه بحضور عدلين يسمعان قول المظاهر كالطلاق، وفي المظاهر البلوغ و العقل و الاختيار و القصد، فلا يقع من الصبي و لا المجنون ولا المكره ولا الساهي و الهازل و السكران، ولا مع الغضب سواء كان سالباً للقصد أم لا على الأقوى، وفي المظاهرة خلوها عن الحيض و النفاس، و كونها في طهر لم يواقعها فيه على التفصيل المذكور في الطلاق، و في اشتراط كونها مدخولاً بها قولان، أصحهما ذلك.

مسألة ٥ ـ الأقوى عدم اعتبار دوام الزوجية بل يقع على المتمتع بها.

مسألة ٦ ـ الظهار على قسمين: مشروط و مطلق، فالأول ما علق على شيء دون الثاني، ويجوز التعليق على الوطء بأن يقول: «أنت علي كظهر أمي إن واقعتك».

مسألة ٧ ـ إن تحقق الظهار بشرائطه فان كان مطلقا حرم على المظاهر وطء المظاهرة، و لا يحل له حتى يكفّر، فاذا كفّر حلّ له وطؤها، و لا يلزم كفارة أخرى بعد وطئها، ولو وطأها قبل أن يكفّر فعليه كفارتان والأشبه عدم حرمة سائر الاستمتاعات قبل التكفير، وإن كان مشروطاً حرم عليه الوطء بعد حصول شرطه، فلو علقه على الوطء لم يحرم عليه الوطء المعلق عليه، و لا تتعلق به الكفارة.

مسألة ٨ ـ إذا طلقها رجعياً ثم راجعها لم يحل له وطؤها حتى يكفر بخلاف ما إذا تزوجها بعد انقضاء عدتها أو كان بائنا، ولو تزوجها في العدة يسقط حكم الظهار.

مسألة ٩ ـ كفارة الظهار أحد أمور ثلاثة مرتبة: عتق رقبة، فان عجز عنه فصيام شهرين متتابعين، و إن عجز عنه فاطعام ستين مسكينا.

مسألة ١٠ ـ لو صبرت المظاهرة على ترك وطئها فلا اعتراض، و إن لم تصبر رفعت أمرها إلى الحاكم الشرعي فيحضره ويخيره بين الرجعة بعد التكفير و بين

Problem # 4. It is a condition for the effectiveness of *Ẓihār* that it must be made in the presence of two witnesses who, like a divorce, should hear the words expressed by the man making *Ẓihār*. In a *Muẓāhir* or a man making *Ẓihār*, it is a condition that he must adult, sane, having freedom of will and intention. So it shall not be made by a boy, a lunatic, one acting under duress or error or jokingly and an intoxicated [person] as also one in a state of anger, irrespective of its having deprived him of intention or not, according to the stronger opinion. In a *Muẓāhirah* or a woman subjected to *Ẓihār*, it is a condition that she must be clean of menstrual and puerperal blood, and in a period of cleanness during which her husband has not had sexual intercourse with her, according to the details already given under the Section on Divorce. As regards the condition of her being consummated, there are two opinions, the more sound being in favour of the condition.

Problem # 5. According to the stronger opinion, there is no condition of the wife being permanent one, as it also takes place with a temporary wife.

Problem # 6. A *Ẓihār* is of two kinds: Contingent and Absolute. The first kind is contingent on something, but not the second one. It is allowed to be made contingent on the performance of sexual intercourse, as when the man says [to the wife]: "*Anti 'alayya ka-ẓahri ummī in wāqa'tuki* (You are like the back of my mother if I perform sexual intercourse with you."

Problem # 7. If *Ẓihār* has taken effect under its required conditions, in case it were an absolute one, sexual intercourse [by her husband] with the wife subjected to *Ẓihār* would be prohibited, and it shall not be legalised until he has expiated, so that if he expiates, it shall be rendered lawful. An other expiation is not required after performing sexual intercourse with her. If, however, he has had intercourse with her before expiation, he shall be liable for two expiations. According to the opinion more compatible with the principles of law, there is no prohibition of having other enjoyments [short of sexual intercourse] with the wife before making expiation. If it were contingent, intercourse with her shall be forbidden after the fulfilment of the condition. If it were contingent on the performance of sexual intercourse, he shall not be forbidden to have intercourse with her that has been made contingent, and no expiation shall be required for it.

Problem # 8. If a man divorces his wife revocably, and then recalls her, it shall not be lawful for him to have intercourse with her until he makes expiation, contrary to the case when he has married her after the expiry of her *'Iddah* or when she was irrevocably separated from her husband. If the man has married her during the currency of the *'Iddah,* the law relating to *Ẓihār* shall not be in operation to his case.

Problem # 9. The expiation for *Ẓihār* is one of the following three things in order: Emancipation of a slave; in case of inability to do so, fasting for two consecutive months; and in case of inability to do so, arranging food for sixty poor persons.

Problem # 10. If the wife subjected to *Ẓihār* is willing to wait in case of non-performance of intercourse with her, there shall be no objection. If, however, she is not willing to wait and files a case with a judge of a Sharī'ah court, the judge shall summon the husband, and give him option either to recall her after

طلاقها، فان اختار أحدهما و إلا أنظره ثلاثة أشهر من حين المرافعة، فان انقضت المدة و لم يختر أحدهما حبسه وضيق عليه في المأكل و المشرب حتى يختار أحدهما، و لا يجبره على أخذهما ولا يطلق عنه.

making expiation or divorce her. If he opts for either of the two alternatives, [well and good]; otherwise, he shall grant him three months time since the filing of the case. If the time expires, and the husband fails to opt for either of the alternatives, the judge shall confine him and tighten upon him the supply of food and drink until he opts for either of the alternatives, but shall not compel him to choose either, or to divorce her.

كتاب الايلاء

و هو الحلف على ترك وطء الزوجة الدائمة المدخول بها أبداً أو مدة تزيد على أربعة أشهر للاضرار بها، فلا يتحقق بغير القيود المذكورة و إن انعقد اليمين مع فقدها، و يترتب عليه آثاره إذا اجتمع شروطه.

مسألة ١ ـ لا ينعقد الايلاء كمطلق اليمين إلا باسم الله تعالى المختص به أو الغالب إطلاقه عليه، و لا يعتبر فيه العربية، و لا اللفظ الصريح في كون المحلوف عليه ترك الجماع في القبل، بل المعتبر صدق كونه حالفاً على ترك ذلك العمل بلفظ له ظهور فيه، فيكفي قوله: «لا أطأك» أو «لا أجامعك» أو «لا أمسّك»، بل وقوله: «لا جمع رأسي و رأسك وسادة أو مخدة» إذا قصد به ترك الجماع.

مسألة ٢ ـ لو تم الايلاء بشرائطه فان صبرت المرأة مع امتناعه عن المواقعة فلا كلام، و إلا فلها الرفع إلى الحاكم فيحضره و ينظره أربعة أشهر فان رجع و واقعها في هذه المدة فهو، و الا أجبره على أحد الأمرين: إما الرجوع أو الطلاق، فان فعل أحدهما وإلا حبسه وضيق عليه في المأكل و المشرب حتى يختار أحدهما، ولا يجبره على أحدهما معيناً.

مسألة ٣ ـ الأقوى أن الأشهر الأربعة التي ينظر فيها ثم يجبر على أحد الأمرين بعدها هي من حين الرفع إلى الحاكم.

SECTION FORTY-TWO

LAWS RELATING TO *ĪLĀ'*

Īlā' means swearing to give up sexual intercourse perpetually or for a period exceeding four months with one's permanent wife whose marriage has been consummated, in order to torture her. It is does not take effect except without the conditions mentioned, even if the vow is constituted without them, but in case of fulfilment of all the requisite conditions, all its consequences shall be applicable.

Problem # 1. An *Īla'* does not take effect, as an absolute oath, except with the Attribute exclusively meant for Allāh, the Exalted or mostly applied to Him.

It is not a condition to make it in Arabic language, nor is there a condition to use explicit words denoting the swearing man's determination to give up sexual intercourse [with his wife] in the natural order [or from the front-side of the woman]; rather, it applies to any words deemed expressive for an oath upon giving up that act. So it is sufficient for him to say: "I shall not have coition with you", or "I shall not have sexual intercourse with you," or "I shall not touch you"; rather, by saying: "Let not a pillow or a cushion bring my head and your head together", in case he intends thereby giving up sexual intercourse.

Problem # 2. If the *Īlā'* is completed according to its requisite conditions, then if the wife is willing to wait despite her husband giving up sexual intercourse [with her], there shall be nothing to say, [or well and good]. Otherwise, she shall be allowed to file a suit [against the husband] before a judge, who shall summon the husband, and grant him four months time.

If he withdraws his oath, and performs sexual intercourse with her, well and good; otherwise, he shall force him to opt either of two alternatives, namely, recall or divorce [his wife].

If he opts either of the two alternatives, [well and good]. Otherwise, he shall confine him and tighten upon him eating and drinking, until he chooses either of the two alternatives, but he shall not compel him to choose one particular alternative of the two.

Problem # 3. According to the stronger opinion, the four months for which the wife is to wait, after which the judge is to force the husband to opt either of the two alternatives shall be reckoned with effect from the filing of the case before the judge.

مسألة ٤ ـ يزول حكم الايلاء بالطلاق البائن و إن عقد عليها في العدة بخلاف الرجعي فانه و إن خرج بذلك من حقها فليست لها المطالبة و الترافع إلى الحاكم لكن لا يزول حكم الايلاء إلا بانقضاء عدتها، فلو راجعها في العدة عاد إلى الحكم الأول، فلها المطالبة بحقها و المرافعة.

مسألة ٥ ـ متى وطأها الزوج بعد الايلاء لزمته الكفارة سواء كان في مدة التربص أو بعدها أو قبلها، لأنه قد حنث اليمين على كل حال و إن جاز له هذا الحنث، بل وجب بعد انقضاء المدة و مطالبتها و أمر الحاكم به تخييراً، و بهذا يمتاز هذا الحلف عن سائر الأيمان، كما أنه يمتاز عن غيره بأنه لايعتبر فيه ما يعتبر في غيره من كون متعلقه مباحاً تساوى طرفاه أو كان راجحاً ديناً أو دنياً.

Problem # 4. The law relating to *Īlā'* becomes inoperative by an irrevocable divorce, even if the husband had contracted the marriage during *'Iddah*, contrary to the case of a revocable divorce in which, though she is deprived of her right, and is no more entitled to claim [husband's withdrawal of the oath] and file the case before a judge, but the law of the *Īlā'* does not inoperative except after the expiry of her *'Iddah*, so that if he recalls her during the currency of the *'Iddah*, the matter shall revert to its first position, and she shall be entitled to claim her right and file a suit [for the restitution of her conjugal right].

Problem # 5. If the husband performs sexual intercourse with his wife after *Īla'*, he shall be bound to make expiation, irrespective of its taking place during the probationary period or before or after it, as he has anyhow broken the oath, even if he was allowed to break it; rather, it had become obligatory for him after the expiry of the probationary period, her claim and order of the judge for exercising the option. In this respect this oath differs from other oaths, as it is distinct from other oaths, as there are no conditions similar to the other oaths, as it is contingent on something legal both sides of which are equal or it has preference from the point of view of this world and hereafter.

كتاب اللعان

وهي مباهلة خاصة بين الزوجين، أثرها دفع الحد أو نفي الولد.

مسألة ١ ـ إنما يشرع اللعان في مقامين: أحدهما ـ فيما إذا رمى الزوج زوجته بالزنا، ثانيهما ـ فيما إذا نفى ولدية من ولد في فراشه مع إمكان لحوقه به.

مسألة ٢ ـ لا يجوز للرجل قذف زوجته بالزنا مع الريب، ولا مع غلبة الظن ببعض الأسباب المريبة، بل ولا بالشياع ولا باخبار ثقة، نعم يجوز مع اليقين، لكن لا يصدّق إذا لم تعترف به الزوجة و لم تكن بينة، بل يحدّ حدّ القذف مع مطالبتها إلا اذا أوقع اللعان الجامعة للشروط الآتية، فيدرأ عنه الحدّ.

مسألة ٣ ـ يشترط في ثبوت اللعان بالقذف أن يدعي المشاهدة، فلا لعان فيمن لم يدعها و من لم يتمكن منها كالأعمى، فيحدان مع عدم البينة، و أن لا تكون له بينة، فان كانت تتعين إقامتها لنفي الحد و لا لعان.

مسألة ٤ ـ يشترط في ثبوت اللعان أن تكون المقذوفة زوجة دائمة فلا لعان في قذف الأجنبية، بل يحدّ القاذف مع عدم البينة، و كذا في المنقطعة على الأقوى، و أن تكون مدخولاً بها، و إلا فلا لعان، و أن تكون غير مشهورة بالزنا، و إلا فلا لعان، بل ولا حدّ حتى يدفع باللعان بل عليه التعزير لو لم يدفعه عن نفسه بالبينة، نعم لو كانت متجاهرة بالزنا لا يبعد عدم ثبوت التعزير أيضاً، و يشترط

SECTION FORTY-THREE

LAWS RELATING TO *LI' ĀN* OR MUTUAL IMPRECATION

Li'ān is a special *Mubāhalah* or cursing each other taking place between the husband and wife, its consequence being averting the infliction of *Hadd* and dissociation of the child.

Problem # 1. According to the Islamic Law, *Li'ān* takes place on two occasions. Firstly, in case the husband chares his wife with *Zinā'*, and Secondly, when the husband denies the paternity of the child born during his wedlock with the possibility of its affiliation to him.

Problem # 2. A husband is not allowed to slander his wife with *Zina'* despite doubt, nor due to the overwhelming assumption according to some causes creating suspicion; rather, not even by circulation of rumours (*shiyā'*) nor by the information by trustworthy persons (*thiqah*). It is allowed when the husband has full certainty, but it cannot be confirmed when it is not admitted by the wife, and there is also no evidence in its favour; rather, it is liable for the infliction of *Hadd* for slander (*Qadhf*) if demanded by the wife, except when *Li'ān* is instituted comprehensively according to the conditions mentioned below that leads to averting the infliction of the *Hadd*.

Problem # 3. It is a condition for the establishment of *Li'ān* for slander that the husband must claim ocular demonstration. So there is no *Li'ān* in case he has no such claim and also in case he has no capability for it, like a blind man. So in the absence of legal evidence, both such persons shall be inflicted *Hadd*. Another condition for the establishment of *Li'ān* is the absence of legal evidence. If he has legal evidence, he must adduce it in order to avert the infliction of *Hadd*, in which case there shall be no *Li'ān*.

Problem # 4. It is also a condition for the establishment of *Li'ān* is that the wife subjected to slander must be a permanent wife. There is no *Li'ān* in slandering a stranger woman; rather the slanderer is inflicted *Hadd* in absence of legal evidence. The same is the case with a temporary wife. It is also a condition that the wife subjected to slander must be one with whom the husband has had sexual intercourse; otherwise, there shall be no *Li'ān*.

Yet another condition [for the establishment of *Li'ān*] is that the wife must not be notorious for being an adulteress; otherwise, there shall be no *Li'ān*; nor shall there be any *Hadd* so that he may avert it through *Li'ān*. Rather he shall be inflicted *Ta'zīr* if he is not able to defend himself by adducing legal evidence.

في اللعان أيضاً أن تكون كاملة سالمة عن الصمم و الخرس.

مسألة ٥ ـ لا يجوز للرجل أن ينكر ولدية من تولد في فراشه مع إمكان لحوقه به بأن دخل بأمه أو أمنى في فرجها أو حواليه بحيث أمكن جذب الرحم إياه، وقد مضى من ذلك إلى زمان وضعه ستة أشهر فصاعداً و لم يتجاوز عن أقصى مدة الحمل، حتى فيما إذا فجر أحد بها فضلاً عما إذا اتهمها، بل يجب الاقرار بولديته، نعم يجب عليه أن ينفيه ولو باللعان مع علمه بعدم تكوّنه منه من جهة علمه باختلال شروط الالتحاق به إذا كان بحسب ظاهر الشرع ملحقاً به لو لا نفيه لئلا يلحق بنسبه من ليس منه فيترتب عليه حكم الولد في الميراث و النكاح و نظر محارمه و غير ذلك.

مسألة ٦ ـ لو نفى ولدية من ولد في فراشه فان علم أنه دخل بأمه دخولاً يمكن معه لحوق الولد به أو أقر بذلك و مع ذلك نفاه لا يسمع منه و لا ينتفي منه لا باللعان و لا بغيره، و أما لو لم يعلم ذلك و لم يقرّ به و قد نفاه إما مجرداً عن ذكر السبب بأن قال: «هذا ليس ولدي» أو مع ذكره بأن قال: «لأني لم أدخل بأمه أصلاً» أو أنكر دخولاً يمكن تكوّنه منه فحينئذ و إن لم ينتف عنه بمجرد نفيه لكن باللعان ينتفي عنه بشرط ثبوت الدخول، و مع عدم ثبوته لم يشرع اللعان مطلقا.

مسألة ٧ ـ إنما يشرع اللعان لنفي الولد إذا كانت المرأة منكوحة بالعقد الدائم، و أما ولد المتمتع بها فينتفي بنفيه من دون لعان و إن لم يجز له نفيه مع عدم علمه بالانتفاء، ولو علم أنه دخل بها أو أمنى في فرجها أو حواليه بحيث يمكن أن يكون الولد منه أو أقر بذلك و مع ذلك قد نفاه لم ينتف عنه بنفيه، و لم يسمع منه ذلك كالدائمة.

مسألة ٨ ـ لا فرق في مشروعية اللعان لنفي الولد بين كونه حملاً أو منفصلاً.

مسألة ٩ ـ من المعلوم أن انتفاء الولد عن الزوج لا يلازم كونه من زنا، لاحتمال تكونه من وطء الشبهة أو غيره، فلو علم الرجل بعدم التحاق الولد به و إن جاز له بل وجب عليه نفيه عن نفسه لكن لا يجوز له أن يرميها بالزنا و ينسب

In case the woman is an open adulteress, it is not far from likely that there should be no *Ta'zīr* as well. It is also a condition in *Li'ān* that the wife must be entirely safe from deafness and dumbness.

Problem # 5. A man is not allowed to deny the parentage of a child born to a woman in his wedlock with the possibility of its affiliation to him by having sexually enjoyed its mother or discharged his semen in her vagina or around it in a way that there could be possibility of its entering her womb as well, while since that time six months or more have passed and it has not exceeded the limit of maximum period of gestation, even in case some one has had illicit intercourse with the wife, let alone in case he has slandered her. Rather he is bound to acknowledge the parentage of the child. Of course, he is bound to deny the affiliation of the child to himself, although by *Li'ān* provided he has knowledge of its not being his child by means of his knowledge about the ambiguity in the conditions for affiliation to him when according to the apparent law it would be affiliated to him if he fails to deny it, perhaps it would cause the affiliation to his descent of a person whose parentage does not belong to him and who would as his child be governed by the laws relating to inheritance, marriage, looking at those within his prohibited degrees (*Maḥārim*), etc.

Problem # 6. If a man denies the parentage of a child born to the woman in his wedlock, then if he knows that he had sexual intercourse with its mother in a way that there is possibility of its affiliation to him, or he has acknowledged about it, nevertheless he has denied [the child's affiliation to himself], no heed shall be paid to his statement, nor the child be dissociated from him by *Li'ān* or without it. If, however, he has no such knowledge, nor has he made any acknowledgement about it, but has denied its affiliation to himself either without any reason by just saying: "This is not my child," or by mentioning the cause when saying: "Because I have not had sexual intercourse with its mother at all," or has denied the performance of intercourse that may lead to the possibility of the child's affiliation to him. In such case, the child shall not be dissociated from him by his mere denial, but it may be dissociated from him on the condition of establishment of sexual intercourse [with its mother]. However, in the absence of its establishment, *Li'ān* is not legal at all.

Problem # 7. A *Li'ān* is legal for the denial of (the affiliation of) a child when the woman is a permanently married wife. As for the child born to a temporary wife, it is dissociated without *Li'ān*, even if it is not lawful for the husband to deny it despite absence of knowledge about its dissociation to him. If, however, he knows that he has had sexual intercourse with the woman, or has discharged his semen in her vagina or around it in a way that there is probability of the child's affiliation to him, or he has already acknowledged it, and despite it he has denied its affiliation to him, it shall not be dissociated from him, and his word about its dissociation shall not be entertained as is the case with a permanent wife.

Problem # 8. There is no difference in the legality of the *Li'ān* for the denial of a child's affiliation, whether the child is in the mother's womb or is already born.

Problem # 9. It is already known that the dissociation of a child from the husband is not necessarily due to its being a product of illicit intercourse, due to the likelihood of an intercourse under a semblance of right, etc. If a man knows about the absence of affiliation of child to him, then though he is allowed,

ولدها بكونه من زنا.

مسألة ١٠ ـ لو أقر بالولد لم يسمع إنكاره له بعد ذلك، سواء كان إقراره صريحاً أو كناية مثل أن يبشر به و يقال له: «بارك الله لك في مولودك» فيقول: «آمين» أو «إن شاء الله تعالى» بل قيل: إنه إذا كان الزوج حاضراً وقت الولادة و لم ينكر الولد مع ارتفاع العذر لم يكن له إنكاره بعده، بل نسب ذلك الى المشهور لكن الأقوى خلافه.

مسألة ١١ ـ لا يقع اللعان إلا عند الحاكم الشرعي، و الأحوط أن لا يقع حتى عند المنصوب من قبله لذلك، و صورته أن يبدأ الرجل و يقول بعد ماقذفها أو نفى ولدها: «أشهد بالله أني لمن الصادقين فيما قلت من قذفها ـ أو نفي ولدها ـ» يقول ذلك أربع مرات، ثم يقول مرة واحدة: «لعنة الله عليّ إن كنت من الكاذبين» ثم تقول المرأة بعد ذلك أربع مرات «أشهد بالله أنه لمن الكاذبين في مقالته من الرمي بالزنا ـ أو نفي الولد ـ» ثم تقول مرة واحدة: «أن غضب الله عليّ إن كان من الصادقين».

مسألة ١٢ ـ يجب ان تكون الشهادة و اللعن على الوجه المذكور، فلو قال أو قالت: أحلف أو أقسم أو شهدت أو أنا شاهد أو أبدلا لفظ الجلالة بغيره كالرحمان و خالق البشر و نحوهما أو قال الرجل: إني صادق أو لصادق أو من الصادقين بغير ذكر اللام أو قالت المرأة: إنه لكاذب أو كاذب أو من الكاذبين لم يقع، و كذا لو أبدل الرجل اللعنة بالغضب و المرأة بالعكس.

مسألة ١٣ ـ يجب أن يكون إتيان كل منهما باللعان بعد إلقاء الحاكم إياه عليه، فلو بادر به قبل أن يأمر الحاكم به لم يقع.

مسألة ١٤ ـ يجب أن تكون الصيغة بالعربية الصحيحة مع القدرة عليها، و إلا أتى بالميسور منها و مع التعذر أتى بغيرها.

مسألة ١٥ ـ يجب أن يكونا قائمين عند التلفظ بألفاظها الخمسة، و هل يعتبر أن يكونا قائمين معاً عند تلفظ كل منهما أو يكفي قيام كل عند تلفظه بما يخصه؟

rather bound to deny its affiliation to him, yet he is not allowed to charge her with *Zinā'* and that the child is the product of an illicit intercourse.

Problem # 10. If a man has acknowledged the affiliation of a child to himself, no heed shall be paid to his subsequent denial of it, irrespective of his acknowledgement being explicit or implicit, as when he is congratulated by some one by saying: "May Allāh make the new-born child a blessing for you," and the man replies, "Amen!" or "If Allāh, the Exalted wills". Rather it is said by some jurists that if the husband is present at the time of the child's birth, but does not deny the child's affiliation despite there being no excuse for it, he shall not subsequently be allowed to deny it, rather its descent shall be affiliated to him, according to the prevalent opinion, though, according to the stronger opinion, it is otherwise.

Problem # 11. A *Li'ān* does not take place except before a judge of the Sharī'ah Court. It is more cautious to say that it does not take place even before a person appointed by the judge. Its procedure is as follows: that after the man has slandered the woman and denied the child's affiliation to himself, he must start by saying: "I swear by Allāh that I am among the truthful in what I have said about slandering her or disowning her child". He shall repeat these words for times. Then he shall say once: "May the curse of Allāh be upon me if I were among the liars." Then the woman says four times: "I swear by Allāh that he is among the liars in what he has said about slandering [me with] *Zinā'* or disowning the child." Then the woman says once: "May the Wrath of Allāh be upon me if he were among the truthful."

Problem # 12. It is obligatory that the oath and imprecation must be made in the manner mentioned above. So if the husband or wife say: "I swear, make an oath, bear witness, I was a witness, or replaces the word of Allāh the Glorious with other words like *Raḥmān*, Creator of Man, or the like, or if the man says: Verily I am truthful, I am surely truthful, or among the truthful, without adding the Arabic letter "*lām* (meaning "surely"), or the woman says: He is surely a liar, or he is a liar, or among the liars, *Li'ān* shall not take place. The same shall be the case if the changes the word "curse" to "wrath"; and the woman vice versa.

Problem # 13. It is obligatory that each of the parties should express the *Li'ān* when he asked to do by the judge. So if either of them hastens to do so before he/she is ordered by the judge [to do so], the *Li'ān* shall not take place.

Problem # 14. It is obligatory that the *Ṣīghah* (prescribed formula or words) be expressed in correct Arabic in case of ability to do so, otherwise as much as it is easy from it, and in case of inability it may be expressed in any language other than Arabic.

Problem # 15. It is also obligatory that both of them should be in a standing posture at the time of expressing their five formulas. Is it a condition that both of them should stand up together at the time of

أحوطهما الأول، بل لا يخلو من قوة.

مسألة ١٦ - إذا وقع اللعان الجامع للشرائط منهما يترتب عليه أحكام أربعة: الأول- انفساخ عقد النكاح والفرقة بينهما، الثاني- الحرمة الأبدية، فلا تحل له أبداً ولو بعقد جديد، و هذان الحكمان ثابتان في مطلق اللعان، سواء كان للقذف أو لنفي الولد، الثالث- سقوط حدّ القذف عن الزوج بلعانه، و سقوط حدّ الزنا عن الزوجة بلعانها، فلو قذفها ثم لاعن و نكلت هي عن اللعان تخلص الرجل عن حدّ القذف، و تحد المرأة حد الزانية، لأن لعانه بمنزلة البينة في إثبات الزنا، الرابع- انتفاء الولد عن الرجل دون المرأة إن تلاعنا لنفيه، بمعنى أنه لو نفاه و ادعت كونه له فتلاعنا لم يكن توارث بين الرجل والولد، و كذا بين الولد و كل من انتسب إليه بالأبوة كالجد و الجدة و الأخ والأخت للأب و كذا الأعمام و العمات، بخلاف الأم و من انتسب إليه بها، حتى أن الاخوة للأب و الأم بحكم الاخوة للأم.

مسألة ١٧ - لو كذّب نفسه بعد ما لاعَنَ لنفي الولد لحق به الولد فيما عليه لا فيما له، فيرثه الولد و لا يرثه الأب و لا من يتقرب به و لا يرث الولد أقارب أبيه باقراره.

pronouncing the formula by each of them or it is sufficient for the party pronouncing the formula exclusively meant for him/her only to stand, [is question on which] it is more cautious to abide by the former; rather, it is not devoid of force.

Problem # 16. After the comprehensive *Li'ān* has been made according to the requisite conditions, the following four consequences shall ensue:

Firstly, automatic dissolution of the marriage contract, and separation effected between the husband and wife.

Secondly, perpetual prohibition, so that she shall not be lawful for the husband for ever, even by contracting a fresh marriage.

These two laws are established in an absolute *Li'ān*, irrespective of its being in respect of a slander or a disavowal of the child.

Thirdly, elimination of the *Ḥadd* for slander (*Qadhf*) from the husband through his *Li'ān*, and elimination of the *Ḥadd* for illicit intercourse from the wife by her *Li'ān*. So if the man slanders the woman and then goes through the process of *Li'ān*, but the woman refuses to go through the process of *Li'ān*, the man shall be exonerated from the *Ḥadd* for slander, and the woman shall be inflicted the *Ḥadd* for an adulteress, as the *Li'ān* instituted by the husband is tantamount to legal evidence in establishing the commission of *Zinā'* (by the woman).

Fourthly, dissociation of the child with the husband but not with the wife, if both have gone through the process of *Li'*ān for the child's disavowal, in the sense that if the husband has disowned the child, while she claims its affiliation with him, then they go through the process of *Li'ān*, there shall be no mutual inheritance between the father and the child, and likewise between the child and all those related to him through the father like the paternal grandfather and grandmother, brothers and sisters on the father's side only as well as the paternal uncles and aunts, contrary to the mother and all those related through her, while the full brothers and sisters [related through both father and mother] shall be treated like those on the mother's side only.

Problem # 17. If the husband repudiates himself after having gone through the process of *Li'ān*, the child shall be affiliated with the father in so far as the father shall be liable for all obligations to his disadvantage, but shall not be entitled to any rights to his advantage from the child. So the child shall have a share in the inheritance of father, but not the father and all those related through him in the child's inheritance, nor shall the child inherit from the relatives on the father's side as a result of the father's acknowledgement of the child to be his own.

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